United Nations

Report of the Ad Hoc Committee on the Establishment of an International Criminal Court

General Assembly
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Supplement No. 22 (A/50/22)

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I. INTRODUCTION

1. The Ad Hoc Committee on the Establishment of an International Criminal Court met at United Nations Headquarters from 3 to 13 April and from 14 to 25 August 1995, in accordance with General Assembly resolution 49/53 of 9 December 1994.

2. Under paragraph 2 of that resolution, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies. 1/

3. The session was opened by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, who represented the Secretary-General and made an introductory statement.

4. Ms. Jacqueline Dauchy, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee; Mr. Andronico O. Adede, Deputy Director (Codification Division, Office of Legal Affairs), acted as Deputy Secretary; Ms. Mahnoush Arsanjani and Ms. Sachiko Kuwabara-Yamamoto, Senior Legal Officers, and Ms. Virginia Morris and Ms. Darlene Prescott, Associate Legal Officers (Codification Division, Office of Legal Affairs), acted as assistant secretaries.

5. At its 1st meeting, on 3 April 1995, the Ad Hoc Committee elected its Bureau, as follows:

Chairman: Mr. Adriaan Bos (Netherlands)

Vice-Chairmen: Mr. Cherif Bassiouni (Egypt)
Mrs. Silvia A. Fernandez de Gurmendi (Argentina)
Mr. Marek Madej (Poland)

Rapporteur: Ms. Kuniko Saeki (Japan)

6. Also at its 1st meeting, the Ad Hoc Committee adopted the following agenda (A/AC.244/L.1):

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Organization of work.

5. Review of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission and consideration, in the light of that review, of arrangements for the convening of an international conference of plenipotentiaries.

6. Adoption of the report.

7. The Ad Hoc Committee had before it, in addition to the draft statute adopted by the International Law Commission at its forty-sixth session, 2/ the relevant chapter of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session

(A/CN.4/464/Add.1), the comments received pursuant to paragraph 4 of General Assembly resolution 49/53 on the establishment of an international criminal court (A/AC.244/1 and Add.1-4) 3/ and a report submitted by the Secretary-General pursuant to paragraph 5 of that resolution, on provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court (A/AC.244/L.2). It also had before it a number of valuable informal papers prepared by some of its members, and received documents prepared by experts and by non-governmental organizations.

8. In accordance with its mandate, the Ad Hoc Committee conducted its work in two phases.

9. In a first phase (3-13 April and 14-23 August 1995), the Ad Hoc Committee conducted a review of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission. During that phase, the Committee established an open-ended Working Group chaired by Mr. Gerhard Hafner (Austria) and entrusted it with the preparation of an informal paper on methods of proceedings (due process). The Committee agreed to include the paper it received from the Working Group in its report (see paras. 128-194 below), as an extremely useful basis for further discussion. It subsequently instructed the Working Group to prepare guidelines for the consideration of: (a) the question of the relationship between States parties, non-States parties and the international criminal court; and (b) the question of general rules of criminal law. Both questions were considered by the Committee on the basis of the schedule prepared by the Working Group. The guidelines are annexed to the present report. The outcome of the first phase of the proceedings is reflected in section II below.

10. In the second phase of its proceedings, the Ad Hoc Committee considered, in the light of its review of the major substantive and administrative issues arising out of the draft prepared by the International Law Commission, arrangements for the convening of an international conference of plenipotentiaries. The outcome of this phase of the proceedings is reflected in section III of the present report.

11. Section IV of the report contains the conclusions of the Ad Hoc Committee.

II. REVIEW OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION

A. Establishment and composition of the Court

12. There was broad recognition that the establishment of an effective and widely accepted international criminal court could ensure that the perpetrators of serious international crimes were brought to justice and deter future occurrences of such crimes. The remark was made that the establishment of a single, permanent court would obviate the need for setting up ad hoc tribunals for particular crimes, thereby ensuring stability and consistency in international criminal jurisdiction. The hope was expressed that an independent court free from political pressure, established on a legal basis to deal with well-defined crimes and offering maximum guarantees to the defendants, would prevent crises which had adverse effects on entire peoples. A note of caution was however struck in this respect by some representatives, who drew attention to the far-reaching legal and financial implications of the project. A remark was also made that the result of the discussion in the Committee would inform the decision of those States which were not committed to the establishment of an international criminal court on this matter.

13. It was emphasized that the proposed court should be established as a body whose jurisdiction would complement that of national courts and existing procedures for international judicial cooperation in criminal matters and that its jurisdiction should be limited to the most serious crimes of concern to the international community as a whole.

14. It was also emphasized that without universal participation the court would not serve the interests of the international community.

1. Method of establishment

15. The view was widely shared that the proposed court should be established as an independent judicial organ by means of a multilateral treaty, as recommended by the Commission. Such an approach based on the express consent of States was considered consistent with the principle of State sovereignty and with the goal of ensuring the legal authority of the court. That approach was also recognized by many delegations as the most practical in the light of the difficulties that would be involved in establishing the court as an organ of the United Nations through an amendment to the Charter of the United Nations. It was suggested that a relatively high number of ratifications and accessions, for instance 60, should be required for the entry into force of the treaty, as a way of ensuring general acceptance of the regime. Concern was however expressed about the delays which such an approach might entail, and it was suggested that no more than 20 or 25 ratifications should be required. Emphasis was placed on the need to promote the general acceptability of the statute of the court by giving due reflection therein to the various legal systems.

16. Some delegations, on the other hand, advocated the establishment of the proposed court as a principal organ of the United Nations, in order to ensure its universality, moral authority and financial viability. The view was expressed that the difficulties involved in the required amendment to the Charter should not be overemphasized, bearing in mind the ongoing discussions

concerning the restructuring of the Security Council, and that resort could be had to the amendment procedure provided for in Article 109 of the Charter.

2. Relationship with the United Nations

17. A close relationship between the proposed court and the United Nations was viewed as an essential condition of the universality and moral authority of the new institution, as well as of its financial and administrative viability. The conclusion of a special agreement between the court and the United Nations as envisaged in article 2 of the draft statute was considered by a number of delegations to be an appropriate way of establishing the required links of functional cooperation between the two institutions, while at the same time preserving the court's independence as a judicial organ. Some delegations however warned that complex issues were involved, and it was suggested that the content of the agreement and the method of its adoption should be provided for in the statute itself, or that the agreement should be elaborated simultaneously with the statute.

3. Nature of the proposed court as a permanent institution

18. The approach reflected in article 4, paragraph 1, of the draft statute, whereby the court would be established as a permanent institution which would act when required to consider a case submitted to it, was described as an acceptable compromise which sought to strike a balance between, on the one hand, the requirements of flexibility and cost-effectiveness in the operation of the court and, on the other hand, the need to promote, as an alternative to ad hoc tribunals, a permanent judicial organ, able to ensure uniformity and consistency in the application and further development of international criminal law. Other delegations agreed with this proposal as long as it would not undermine the permanence, the stability and the independence of the court.

19. It was suggested that the permanence and independence of the court would be enhanced if some officials, such as the judges, the Presidency, the Registrar and/or the prosecutor, were appointed on a full-time basis.

4. Appointment of the judges and of the prosecutor

20. As regards the appointment of judges, paragraphs 1 and 2 of article 6 pertaining to the qualifications and election of judges gave rise to objections. Concern was voiced by some delegations that too rigid a distinction between judges with criminal trial experience and those with competence in international law might result in an unjustifiable quota system and complicate the selection of candidates. The singling out of those two areas of the law was furthermore considered by some delegations as unduly restricting the sources of expertise on which the court should be able to rely. A more flexible formulation, drawing inspiration from article 13, paragraph 1, of the statute of the Tribunal for the former Yugoslavia, was found preferable by some delegations. Other delegations emphasized the importance of expertise in criminal law, consistent with the character of the court, some of them suggesting that every judge should have criminal law qualifications and experience. The remark was also made that the procedures for the nomination and election of judges applicable in the context of the International Court of Justice and the International Tribunal for the former Yugoslavia afforded better guarantees of independence and universality.

21. It was accordingly suggested by some delegations that the pool from which candidates would be selected should go beyond the circle of States parties and that there should be an initial screening, for example through nomination by national groups. It was also suggested that the elections should be conducted by the General Assembly and the Security Council rather than by the States parties, in order to enhance the acceptability of the institution, that a filtering role might be envisaged for the Security Council and that a two-thirds majority should be required for election. It was observed that other delegations were not in favour of extending the role of the Security Council in this regard given that it could create limitations in the ultimate selection of judges for the court.

22. It was further suggested that paragraph 5 of article 6 should be amended to provide for equitable geographical representation as well as the representation of the principal legal systems of the world. The view was expressed that the principal legal systems of the world should be identified for the purposes of representation. Some delegations emphasized that small States should be adequately represented in the court. Other delegations questioned the relevance of those criteria.

23. Concerning the appointment of the prosecutor, expertise in the investigation and prosecution of criminal cases was considered to be an important requirement. It was suggested that impartiality would be better guaranteed if the prosecutor and deputy prosecutors were of different nationality and that a system of appointment by the court on the recommendation of States parties, or vice versa, would reinforce the authority and independence of the officials concerned.

24. The powers of the Presidency were considered by many delegations to be excessive and in need of further examination. The rotation system between the Trial Chambers and the Appeals Chamber was also criticized.

5. Role of the prosecutor

25. Suggestions were made to give the prosecutor the power to initiate investigations and prosecutions. The view was expressed that the prosecutor should have the consent of interested States before initiating investigations and prosecutions. Another suggestion was to include in the statute rules on disqualification.

6. Adoption of the rules of the court

26. The substantive link between the statute and the rules of the court was widely recognized, as was also the special importance of the rules of evidence and of particular elements of substantive criminal law. Many delegations suggested that the rules of the court should be elaborated and adopted simultaneously with the statute, or incorporated in the statute itself. Some delegations however considered that internal rules could be elaborated and adopted by the judges themselves.

7. Other issues

27. Several delegations noted that the draft statute allowed rotation of the judges between the Trial and Appeals Chambers and expressed concern about the compatibility of such arrangements with the requirements of due process.

28. Some delegations favoured the inclusion of a provision on the non-retroactivity of the statute, bearing in mind article 28 of the 1969 Vienna Convention on the Law of Treaties.

B. The principle of complementarity

1. Significance of the principle of complementarity

29. The third preambular paragraph of the draft statute provides that the establishment of an international criminal court "is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective". The principle of complementarity 4/ thus deals with the relationship between the proposed international criminal court and national criminal and investigative procedures. Many delegations referred to the commentary to the preamble as clearly indicating that the International Law Commission did not intend the proposed court to replace national courts. The principle of complementarity was described as an essential element in the establishment of an international criminal court. It was, however, also viewed as calling for further elaboration so that its implications for the substantive provisions of the draft statute could be fully understood.

30. Several delegations felt that an abstract definition of the principle would serve no useful purpose and found it preferable to have a common understanding of the practical implications of the principle for the operation of the international criminal court. Some saw merit in regrouping certain provisions of the draft statute on which the principle of complementarity had a direct bearing such as those relating to admissibility and judicial assistance.

31. A number of delegations stressed that the principle of complementarity should create a strong presumption in favour of national jurisdiction. Such a presumption, they said, was justified by the advantages of national judicial systems, which could be summarized as follows: (a) all those involved would be working within the context of an established legal system, including existing bilateral and multilateral arrangements; (b) the applicable law would be more certain and more developed; (c) the prosecution would be less complicated, because it would be based on familiar precedents and rules; (d) both prosecution and defence were likely to be less expensive; (e) evidence and witnesses would normally be more readily available; (f) language problems would be minimized; (g) local courts would apply established means for obtaining evidence and testimony, including application of rules relating to perjury; and (h) penalties would be clearly defined and readily enforceable. It was also noted that States had a vital interest in remaining responsible and accountable for prosecuting violations of their laws - which also served the interest of the international community, inasmuch as national systems would be expected to maintain and enforce adherence to international standards of behaviour within their own jurisdiction.

32. Other delegations pointed out that the concept of complementarity should not create a presumption in favour of national courts. Indeed while such courts

should retain concurrent jurisdiction with the court, the latter should always have primacy of jurisdiction.

33. The view was also expressed that in dealing with the principle of complementarity a balanced approach was necessary. According to such view, it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction.

34. The comment was made that the issue of complementarity and the relationship between the international criminal court and national courts would have to be examined in a number of other areas, e.g., international judicial cooperation and various issues involving surrender, extradition, detention, incarceration, recognition of decisions and applicable law.

35. On the question whether the principle of complementarity should be reflected in the preamble or embodied in an article of the draft statute, two views were expressed.

36. According to one view, a mere reference in the preamble was insufficient, considering the importance of the matter, and a definition or at least a mention of the principle should appear in an article of the statute, preferably in its opening part. Such a provision would, it was stated, remove any doubt as to the importance of the principle of complementarity in the application and interpretation of subsequent articles.

37. According to another view, the principle of complementarity could be elaborated in the preamble. Reference was made in this context to article 31 of the Vienna Convention on the Law of Treaties, according to which the preamble to a treaty was considered part of the context within which a treaty should be interpreted, and the remark was made that a statement on complementarity in the preamble to the statute would form part of the context in which the statute as a whole was to be interpreted and applied.

2. Implications of the principle of complementarity as regards the list of crimes which would fall under the jurisdiction of an international criminal court

38. According to a number of delegations, the principle of complementarity required that the draft statute provide for a single legal system for all crimes within the jurisdiction of the court. Such a legal system should be transparent and efficient and aimed at enhancing the credibility and, therefore, the acceptability of the court. It was argued that such a single legal system was conceivable only if the jurisdiction of the court was limited to a few "hard-core" crimes. Otherwise, a multiplicity of jurisdictional mechanisms would have to be established and there would be an increased risk of endless challenges to the jurisdiction of the court. It was also noted that limiting the jurisdiction of the court to a few crimes would simplify the problem of consent to the exercise of jurisdiction, whereas expanding the list of crimes would have the opposite effect.

3. Role of national jurisdiction

39. A number of delegations observed that the meaning of the expression "national jurisdiction" needed to be clarified. "National jurisdiction", it was stated, was not limited to territorial jurisdiction but also included the exercise of jurisdiction by the States competent to exercise jurisdiction in accordance with established principles and arrangements: thus, with respect to the application of military justice, it was not so much the territorial State that was important, but the State whose military was involved. The status-of-forces agreements and extradition agreements also had to be taken into consideration in determining which State had a strong interest in the issue and should consequently exercise jurisdiction.

40. As regards exceptions to the exercise of national jurisdiction, the following issues were raised: (a) nature of the exceptions to the exercise of national jurisdiction; (b) authority competent to decide on such exceptions; and (c) timing requirements.

(a) Nature of the exceptions to the exercise of national jurisdiction

41. As regards the nature of the exceptions, and with reference to the phrase, in the third preambular paragraph of the draft statute, "where such trial procedures [in national criminal justice systems] may not be available or may be ineffective", there was a wide measure of agreement that the words "available" and "ineffective" were unclear. Questions were raised as to the standards for determining whether a particular national judicial system was "ineffective". The principle of complementarity as reflected in the above-quoted phrase was furthermore viewed by some delegations as barring inherent jurisdiction as provided for in paragraph 1 (a) of article 21 of the draft statute, as well as "exclusive" jurisdiction.

42. In this context, the observation was made that the commentary to the preamble clearly envisaged a very high threshold for exceptions to national jurisdiction and that the International Law Commission only expected the international criminal court to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts. It was further stressed that the exercise of national jurisdiction encompassed decisions not to prosecute. In this context, it was suggested that the presumption in article 35 of the draft statute should be reversed so that decisions of acquittal or conviction by national courts or decisions by national prosecution authorities not to prosecute were respected except where they were not well-founded. Some delegations put forward the view that it would be preferable if the principles set out in article 35 in regard to admissibility and conferring a discretion upon the court to decide that a case before the court was inadmissible on the grounds set out in subparagraphs (a) to (c) were laid down as a condition rather than by way of conferring a discretionary power. Another remark was that article 25 of the draft should allow the international criminal court to pursue a complaint only when no State was investigating, or had already investigated, the case. A comparable provision could, it was suggested, be included in articles 26 and 27, as well as in articles 51 and 52, where it would set a limit on the obligation of States to assist the international criminal court. While such a provision was viewed by some delegations as giving adequate expression to the concept of complementarity, others felt that the duty of the international criminal court to respect the decisions of national courts extended only to manifestly well-founded decisions.

43. It was stressed that the standards set by the Commission were not intended to establish a hierarchy between the international criminal court and national courts, or to allow the international criminal court to pass judgement on the operation of national courts in general. In this context, concern was expressed by some delegations that article 42 on non bis in idem conferred upon the international criminal court a kind of supervisory role vis-à-vis national courts, notwithstanding the fact that the jurisdiction of the international criminal court was concurrent with that of national courts. Also in relation to article 42, it was suggested to delete the distinction between ordinary crimes and crimes of international concern, since such a distinction was not common to all legal systems and could cause substantial legal problems.

44. A provision that was viewed by some delegations as departing from the concept of complementarity was paragraph 4 of article 53, which required a State party to give priority, as far as possible, to requests for arrest and transfer emanating from the court over extradition requests from other States.

45. According to several delegations, the decision on whether national jurisdiction should be set aside should be made on a case-by-case basis, taking into account, among other factors, the probability that national jurisdiction would be exercised in a particular instance. It was noted that, while the jurisdiction of an international criminal court was compelling where there was no functioning judicial system, the intervention of the court in situations where an operating national judicial system was being used as a shield required very careful consideration. The remark was also made that if national authorities failed, without a well-founded reason, to take action in respect of the commission of a crime under the draft statute, the international criminal court should exercise its jurisdiction.

46. Some delegations felt that the statute should address the issue of national amnesties and provide guidelines on the matter, indicating the circumstances in which the international criminal court might ignore, or intervene ahead of, a national amnesty.

47. It was also suggested that the draft statute should provide for the possibility that a State might voluntarily decide to relinquish its jurisdiction in favour of the international criminal court in respect of crimes expressly provided for under its statute. This suggestion gave rise to reservations on the ground that it was not consistent with some delegations' view of the principle of complementarity. In this respect, the remark was made that the international criminal court should in no way undermine the effectiveness of national justice systems and should only be resorted to in exceptional cases.

(b) Authority competent to decide on exceptions to the exercise of national jurisdiction

48. Some delegations felt that the power to decide on the exceptions to national jurisdiction should be vested in the international criminal court. The latter court should, it was stated, have primacy over national courts, and article 9 of the statute of the International Tribunal for the former Yugoslavia was viewed as a good model to follow in this respect. Reference was also made to article 24 of the draft statute, which spelled out the duty of the international criminal court to satisfy itself that it had jurisdiction. Practical reasons were furthermore invoked in favour of leaving it to the international criminal court to decide whether it should exercise jurisdiction or yield to national jurisdiction.

49. Other delegations found the above arguments unconvincing. They did not view article 9 of the statute of the International Tribunal for the former Yugoslavia as an appropriate precedent inasmuch as the international community was aware, at the time of the establishment of the said Tribunal, of the special circumstances of the situation and had consequently made certain assumptions in creating the Tribunal; in the present instance, it was necessary to define criteria and establish standards to be applied in many diverse situations in the future. Similarly, the view was expressed that caution should be exercised in referring to past war crimes tribunals and the ad hoc Tribunal on Rwanda as relevant precedents for discussing the future international criminal court. The view was also expressed that the burden of proof as to the appropriateness of an exception to the exercise of national jurisdiction should be on the international criminal court.

50. According to some delegations, one could envisage an international criminal court with inherent jurisdiction over a few "hard-core" crimes which would be presumed to have a superior claim to exercise jurisdiction, on the understanding, however, that the presumption would be rebuttable on the basis of criteria to be defined in the statute. If, on the other hand, the jurisdiction of the international criminal court encompassed treaty-based crimes, then the regimes set out in those treaties should have primacy, and only if they proved ineffective should the international criminal court intervene.

(c) Timing requirements

51. The remark was made that exceptions to national jurisdiction should be considered at the very first stage, before the prosecutor of the international criminal court initiated an investigation, because even the initiation of an investigation might interfere with the exercise of national jurisdiction. It was also said that if a case was being investigated or was pending before a national court, the international criminal court should suspend the exercise of its jurisdiction, even though it might subsequently resume consideration of the case in accordance with article 42 of the draft statute.

C. Other issues pertaining to jurisdiction

1. Applicable law and jurisdiction of the court

52. As regards article 33 of the draft statute, the view was expressed that, to satisfy the requirements of precision and certainty in criminal proceedings, the law to be applied by the court should be clearly determined by the statute rather than through reliance on national conflict-of-law rules. Applicable law, it was suggested, should be understood to cover not only the offences and penalties but also principles of individual criminal responsibility, defences and the procedural and evidentiary law to be addressed in the rules of the court under article 19. While some delegations felt that the statute itself should provide the applicable law by elaborating or incorporating the relevant conventional and customary law, other delegations emphasized the importance of accelerating the work on the draft Code of Crimes against the Peace and Security of Mankind to address such matters. Some delegations advocated a link between the draft Code and the statute.

53. Subparagraph (a) of article 33 was described as self-evident. The suggestion was made to include in subparagraph (b) a reference to the treaties listed in the annex and to bring the wording in line with Article 38 of the Statute of the International Court of Justice to avoid uncertainty or confusion,

although some delegations questioned the appropriateness of applying the principles and rules of international law. Subparagraph (c), it was stated, should be amended to make it clear that national law was a subsidiary means for determining general principles of law common to the major legal systems or, alternatively, should clearly indicate the relevant national law, the State whose law would apply and the circumstances in which such law would apply, particularly as national law was far from uniform. It was also suggested that a new provision should be added concerning customary law, bearing in mind Article 38 of the Statute of the International Court of Justice.

(a) Question of the crimes to be covered by the statute and the specification of the crimes

(i) General observations

54. As to the scope of the subject-matter jurisdiction of the court, several delegations emphasized the importance of limiting it to the most serious crimes of concern to the international community as a whole, as indicated in the second preambular paragraph, for the following reasons: to promote broad acceptance of the court by States and thereby enhance its effectiveness; to enhance the credibility and moral authority of the court; to avoid overloading the court with cases that could be dealt with adequately by national courts; and to limit the financial burden imposed on the international community. It was suggested that the principle of limited jurisdiction should be reflected not only in the preamble but also in an operative provision, possibly in a new article 1 or in article 20, and should be further clarified through the identification of precise criteria.

55. With regard to the selection of crimes, a number of delegations suggested that the jurisdiction of the court should be limited to three or four of the crimes under general international law listed in subparagraphs (a) to (d) of article 20 because of the magnitude, the occurrence and the inevitable international consequences of these crimes, with different views being expressed concerning subparagraph (b). The view was expressed that the inclusion of the three crimes covered by subparagraphs (a), (c) and (d) would be sufficient to obviate the need for the creation of additional ad hoc tribunals given the scope of jurisdiction of the two existing tribunals. Further, some delegations were of the view that various treaty-based crimes referred to in subparagraph (e), among which individual delegations singled out terrorist and drug-related offences, torture and apartheid, were also serious crimes of international concern and should be included. In the view of some delegations, the list of crimes mentioned under this subparagraph was not exhaustive. There were also suggestions to add to the list of treaty-based crimes violations of the Convention on the Safety of United Nations and Associated Personnel as well as environmentally related offences. Various delegations suggested an approach to the selection of crimes consisting in initially limiting the court's jurisdiction to the first three or four crimes, while providing for some type of mechanism to enable the States parties to the statute to consider the addition of other crimes at a later stage. A suggestion was also made for an approach in which States could agree to refer to the court extraordinary cases which were not otherwise covered.

56. The remark was made that the selection of crimes would define the role to be played by the future court. Attention was also drawn to the implications that the selection of crimes would have on other issues relating to the court, including the principle of complementarity, the State consent requirements and the trigger mechanism for the exercise of jurisdiction, as well as the

obligations of States parties with respect to the cooperation and judicial assistance to be provided to the court. In particular, some delegations felt that limiting the jurisdiction of the court to a few "core crimes" under general international law would facilitate the consideration of other issues relating to the court and the adoption of a coherent, unified approach to the various requirements for the exercise of jurisdiction. However, it was also stated that broadening the court's jurisdiction might make it possible to use this institution as a further means for the peaceful settlement of disputes.

57. As regards the specification of crimes, the view was expressed that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (nullum crimen sine lege and nulla poena sine lege) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused. The following methods were suggested for defining the crimes listed in article 20: referring to, or incorporating, the provisions of relevant treaties; elaborating definitions by using the Nürnberg Charter and the statutes of the International Tribunals for the former Yugoslavia and for Rwanda as a starting-point; or finalizing the draft Code of Crimes against the Peace and Security of Mankind as a matter of priority to avoid delays in the establishment of the court. Some delegations expressed reservations about using the draft statutes for the ad hoc Tribunals or the draft Code of Crimes as a basis for defining the crimes.

58. Several delegations were of the view that it would be important to include in the statute the principle of the non-retroactivity of its provisions. The view was also expressed that the statute should include a provision that would prevent the court from imposing punishment on the basis of customary law without a clear definition of the crime being included in the statute.

(ii) Genocide

59. As regards subparagraph (a) of article 20, many delegations agreed that the crime of genocide met the criteria for inclusion in the jurisdiction of the court set forth in the preamble.

60. A number of delegations were of the view that the authoritative definition of the crime of genocide was to be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 5/ which was widely accepted by States and had been characterized as reflecting customary law by the International Court of Justice. 6/ Some delegations favoured reproducing the relevant provisions in the statute of the court, as had been done in the statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda.

61. There was a suggestion to expand the definition of the crime of genocide contained in the Convention to encompass social and political groups. This suggestion was supported by some delegations who felt that any gap in the definition should be filled. However, other delegations expressed opposition to amending the definition contained in the Convention, which was binding on all States as a matter of customary law and which had been incorporated in the implementing legislation of the numerous States parties to the Convention. The view was expressed that the amendment of existing conventions was beyond the scope of the present exercise. Concern was also expressed that providing for different definitions of the crime of genocide in the Convention and in the statute could result in the International Court of Justice and the international criminal court rendering conflicting decisions with respect to the same situation under the two respective instruments. It was suggested that acts such

as murder that could qualify as genocide when committed against one of the groups referred to in the Convention could also constitute crimes against humanity when committed against members of other groups, including social or political groups.

62. There was a further suggestion to clarify the intent requirement for the crime of genocide by distinguishing between a specific intent requirement for the responsible decision makers or planners and a general-intent or knowledge requirement for the actual perpetrators of genocidal acts. Some delegations felt that it might be useful to elaborate on various aspects of the intent requirement without amending the Convention, including the intent required for the various categories of responsible individuals, and to clarify the meaning of the phrase "intent to destroy", as well as the threshold to be set in terms of the scale of the offence or the number of victims. The view was expressed that the International Court of Justice might shed some light on these aspects of the definition of genocide in relation to the case that was currently before it. 7/ It was also suggested that the question of intent could be addressed in greater detail with respect to the various crimes within the jurisdiction of the court in connection with the applicable law.

(iii) Aggression

63. Some delegations supported the inclusion of aggression or the planning, preparation, initiation or waging of a war of aggression among the crimes falling within the jurisdiction of the court. In this respect, it was noted that the question of the inclusion of this crime in the draft statute and the issue of the powers of the Security Council under article 23 of the draft statute were closely related. While recognizing that defining aggression for the purpose of the statute would not be an easy task, those delegations drew attention to article 6 (a) of the Nürnberg Charter, which, it was stated, reflected the position of the 20 States participating in the London Agreement as regards the principle of individual criminal responsibility for aggression and was part of existing applicable law, as well as to the Definition of Aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974, to the definition proposed in the context of the ongoing work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind and to the definition worked out by the Committee of Experts which had met in June 1995 under the auspices of the International Association of Penal Law, the International Institute of Higher Studies in Criminal Sciences and the Max Planck Institute for Foreign and International Criminal Law. In their opinion, the United Nations, whose Charter enshrined the principle of the non-use of force and which had been created to save future generations from the scourge of war, could not, 50 years after the Nürnberg trial, exclude aggression from the jurisdiction of the international criminal court, thereby taking a retrogressive step and ignoring the contrary line taken by the International Law Commission in the context of its work on the draft Code of Crimes against the Peace and Security of Mankind.

64. Other delegations opposed the inclusion of aggression. Many questioned the possibility of arriving at a definition of aggression for the purpose of the statute within a reasonable time-frame and expressed concern that such a time-consuming exercise would unduly delay the finalization of the statute. They pointed out that the ultimate goal - namely, to create an effective organ for the administration of justice - should not be sacrificed to political considerations. In their opinion, the Nürnberg Charter was unhelpful in the present context because it referred to a war of aggression that had already been waged and characterized as such; in contrast, a prospective definition would

have to tackle the difficult issue of possible justifications such as self-defence or humanitarian intervention. As for the 1974 Definition of Aggression, it was not intended for the establishment of individual criminal responsibility. The question was also raised whether the reference in both instruments to wars of aggression - as opposed to acts of aggression - still provided an acceptable test, and attention was drawn in this context to common article 2 of the Geneva Conventions of 1949. The Definition of Aggression was furthermore viewed as unhelpful for criminal law purposes inasmuch as (a) the list of acts of aggression contained in its article 3 was not exhaustive; and (b) it differentiated between wars of aggression, which were described as criminal, and acts of aggression, which amounted to international torts entailing State responsibility. The remark was made in this connection that for the International Law Commission to attach individual criminal responsibility to acts of aggression involved a substantive amount of progressive development of international law.

65. Some among the latter delegations also pointed out that aggression was not punishable under national penal codes. In response to this argument, the remark was made that the penal code currently under consideration in the Parliament of a Member State did provide for the punishment of aggression. Furthermore, the fact that most national legislations were silent on the matter was a mere consequence of the lack of a definition at the international level and of the corresponding implementation mechanism; it provided an additional reason to include aggression in the statute, bearing in mind the principle of complementarity and the concept of unavailability of criminal procedures reflected in the preamble to the draft prepared by the International Law Commission.

66. With reference to the practical difficulty of bringing political leaders to trial for aggression, some delegations observed that the problem also arose in relation to other crimes, such as genocide. Other delegations considered it ill-advised to extend the jurisdiction of the court to acts that could not, in fact, form the basis of actual prosecution, and thereby run the risk of discrediting the court and undermining its moral authority.

67. In the view of some delegations, the goal of those who favoured the inclusion of aggression among the crimes falling within the jurisdiction of the court could be achieved without getting embroiled in the considerable difficulties referred to above, bearing in mind that aggression often entailed violations of humanitarian law. This argument was found unconvincing inasmuch as a violation of jus ad bellum was quite conceivable without a violation of jus in bello.

68. As regards the justiciability of the conduct under consideration, some members pointed out that aggression was an act of State and that the qualification of a particular act as aggression was a political decision. Others observed that aggression was not a mere political act entailing no legal consequences but a breach of a fundamental norm of international law and that a finding of aggression, although part of a political process, was a legal decision taken in accordance with the Charter. It was also said that, while aggression undoubtedly involved political aspects, the same was true of other acts generally recognized as qualifying for inclusion within the jurisdiction of the court.

69. A number of delegations commented on the problem of reconciling, on the one hand, the primary responsibility of the Security Council in the maintenance of international peace and security and its role in making determinations of acts

of aggression and, on the other hand, the responsibility that would devolve on the court to establish individual criminal responsibility for the same act - difficulties that article 23 of the Commission's draft vividly brought to light.

70. Some delegations objected to the idea of leaving it to the Security Council to determine the existence of an act of aggression and relying on the future court to ascribe criminal responsibility to specific individuals. Such a solution, it was stated, gave rise to problems of due process and would deprive the court of its independence: could the court find that a Head of State was not guilty of aggression notwithstanding a prior determination by the Security Council that the State concerned had committed an act of aggression? On the other hand, could the court be allowed to act independently in determining the existence of a situation of aggression notwithstanding the prerogatives of the Security Council? Caution was also urged on the ground that the question of the existence and/or consequences of an act of aggression might come up not only before the Security Council and the future court but also before the International Court of Justice and that legal coherence required that the three forums should not arrive at inconsistent or conflicting conclusions.

71. Other delegations considered it necessary and possible to find a proper balance between the requirement of the independence of the court and the need to respect the primary role of the Security Council in the maintenance of international peace and security. Concern was, however, expressed that such a balance was not achieved in article 23 of the Commission's draft. Most delegations commented on article 23 in the context of the discussion of the role of the Security Council in relation to the exercise of jurisdiction (see paras. 120-126 below). In the present context, however, the remark was made that the limitation contemplated in paragraph 2 had no counterpart in the Statute of the International Court of Justice and that the paragraph should be redrafted so as to provide that the court could consider a complaint of aggression if no decision had been taken by the Council on the matter. In the opinion of the delegations concerned, the responsibility of the Council in qualifying a particular conduct as aggression did not result in the court being deprived of a role in determining the criminal responsibility of individuals as regards the planning, preparation or launching of aggression.

(iv) Serious violations of the laws and customs applicable in armed conflict

72. Regarding subparagraph (c) of article 20, many delegations agreed that serious violations of the laws and customs applicable in armed conflict met the criteria for inclusion in the jurisdiction of the court set forth in the preamble. The view was expressed that the concept of seriousness might require further clarification or possibly be accompanied by additional criteria to distinguish between violations of greater or lesser gravity, magnitude, scale or duration and to ensure that only the former would be included in the jurisdiction of the court. In this regard, the view was also expressed that not all violations of the relevant laws and customs amounted to crimes of such seriousness that they should be dealt with by an international court.

73. A number of delegations felt that, under general international law, this category of crimes should encompass not only serious violations of the laws and customs applicable in armed conflict in terms of the Hague Conventions and Regulations but also grave breaches of the 1949 Geneva Conventions that were currently covered by subparagraph (e), as well as comparably serious violations of other relevant conventions that had attained the status of customary law. While some delegations felt that subparagraph (c) should also include violations

of Additional Protocol I to the 1949 Geneva Conventions, a question was raised as to whether that instrument as a whole reflected customary law. A preference was also expressed for a more limited approach to this category of crimes based on the 1949 Geneva Conventions, which were widely accepted by States.

74. There were different views as to whether the laws and customs applicable in armed conflict, including treaty crimes, should include those governing non-international armed conflicts, notably common article 3 of the 1949 Geneva Conventions and Additional Protocol II thereto. Those who favoured the inclusion of such provisions drew attention to the current reality of armed conflicts, the statute of the ad hoc Tribunal for Rwanda and the recent decision of the ad hoc Tribunal for the former Yugoslavia recognizing the customary-law status of common article 3. However, other delegations expressed serious reservations concerning the possibility of covering non-international armed conflicts and questioned the consistency of such an approach with the principle of complementarity. As regards Additional Protocol II, the view was expressed that that instrument as a whole had not achieved the status of customary law and therefore was binding only on States parties thereto. The view was also expressed that non-international armed conflicts should not fall within the jurisdiction of the court either with respect to common article 3 or Additional Protocol II.

75. In considering the related offences committed in armed conflict that could be regrouped within a single category, attention was drawn to the inconsistency and possible confusion resulting from the use of the term "serious violations" in subparagraph (c), the term "exceptionally serious violations" in subparagraph (e) and the term "grave breaches" in the Geneva Conventions. It was suggested that this terminological problem could be solved by using the term "war crimes" to cover all of the relevant offences.

76. With regard to the specification of the crimes, some delegations felt that the reference to serious violations of the laws and customs applicable in armed conflict was not sufficiently precise for the purposes of the principle of legality. In this regard, particular emphasis was placed on the need to define the specific content or constituent elements of the violations in question with a view to indicating the onus on the prosecution, ensuring due process and respect for the rights of the accused and providing guidance to the court in its determination of the merits of the charges. Some delegations drew attention to the relevant provisions of the Nürnberg Charter and of the statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda as possible starting-points for the elaboration of the definitions of the crimes concerned, with a preference being expressed, however, for an exhaustive list of offences to ensure respect for the nullum crimen sine lege principle. In terms of the list of offences, the remark was made that rape and similar offences should be included. The view was furthermore expressed that the specification of the violations provided for in common article 3 of the 1949 Geneva Conventions - assuming they were to be included - would need to take into account the absence of any explicit provision for international criminal responsibility in that article.

(v) Crimes against humanity

77. As regards subparagraph (d) of article 20, many delegations expressed the view that crimes against humanity met the criteria for inclusion in the jurisdiction of the court set forth in the preamble. It was suggested that the jurisdiction of the court with respect to this category of crimes should be subject to further qualification to ensure a balanced approach in comparison to

the one reflected in subparagraph (c), which made room for the seriousness criterion. In this regard, attention was drawn to the reference to armed conflict in the statute of the ad hoc Tribunal for the former Yugoslavia and to the requirement in the statute of the ad hoc Tribunal for Rwanda that the offences provided for therein should be of a systematic or widespread nature.

78. With regard to the specification of the crimes, it was pointed out that there was no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity. Several delegations were of the view that the definitions contained in the Nürnberg Charter, the Tokyo Tribunal Charter, Control Council Law Number 10 and the statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda could provide guidance in the elaboration of such a definition; at the same time, they recognized the need to reconcile differences in those definitions and to further elaborate the specific content of such offences as extermination, deportation and enslavement. More specific remarks with respect to the elements that should be reflected in the definition of crimes against humanity included the following: the crimes could be committed against any civilian population in contrast to war crimes; the crimes usually involved a widespread or systematic attack against the civilian population rather than isolated offences; the additional persecution grounds contained in the statute of the ad hoc Tribunal for Rwanda were questionable and unnecessary in the present context; and the list of offences should include rape but not persecution, which was described as too vague a concept. While some delegations favoured an exhaustive list of offences, other delegations felt that it might be useful to retain a residual category of offences; it was, however, recognized that the term "other inhumane acts" required further clarification.

79. There were different views as to whether crimes against humanity could be committed in peacetime in the light of the Nürnberg precedent, as well as the statute of the ad hoc Tribunal for the former Yugoslavia. Some delegations singled out, among the developments since the Nürnberg precedent which militated in favour of the exclusion of any requirement of an armed conflict, the precedent of the statute of the ad hoc Tribunal, for Rwanda and the recent decision of the ad hoc Tribunal for the former Yugoslavia in the Tadić case. However, the view was also expressed that the crimes in question were usually committed during an armed conflict and only exceptionally in peacetime, that the existence of customary law on this issue was questionable in view of the conflicting definitions contained in the various instruments and that the matter called for further consideration.

80. With regard to the relationship between crimes against humanity and genocide, the view was expressed that any overlap between the two categories of crimes should be avoided and that the same standard of proof should be required for both, notwithstanding any differences in the intent requirements.

(vi) Treaty-based crimes

81. With regard to subparagraph (e) of article 20, (see para. 55 above), the view was expressed that the offences established in the treaties listed in the annex might be of lesser magnitude than the other offences provided for in article 20 and that their inclusion within the jurisdiction of the international criminal court entailed a risk of trivializing the role of the court, which should focus on the most serious crimes of concern to the international community as a whole. Also in favour of the exclusion of the crimes in question from the jurisdiction of the court, it was argued that the said crimes were more effectively dealt with by national courts or through international cooperation.

With specific reference to terrorism and illegal drug trafficking, concern was expressed that extending the jurisdiction of the court to the corresponding crimes would result in an overburdening of the court.

82. Merit was, however, also found in retaining all or some of the crimes dealt with in the treaties listed in the annex. It was pointed out in this connection that the international criminal court was not meant to replace existing mechanisms for the prosecution of such treaty crimes as terrorism and drug-related offences. Rather, it was intended to be an option available to States parties to the statute, which would determine whether a particular crime was better dealt with at the domestic or the international level. The fact that many countries did not have the resources to engage in large-scale intelligence gathering, which was often required for the prosecution of terrorist and drug-related crimes, was also mentioned as militating in favour of the inclusion of treaty-based crimes within the jurisdiction of the court.

83. The view was expressed that it was necessary to include the conventions dealing with acts of terrorism in the list contained in the annex so as to bring the acts in question within the court's jurisdiction without prejudice to the principle of complementarity and national jurisdiction. Other delegations, however, expressed grave doubts as to the wisdom and feasibility of proceeding along those lines.

84. On the question whether other instruments should be added to the list contained in the annex, some delegations proposed the inclusion of the Convention on the Safety of United Nations and Associated Personnel inasmuch as it was likely to operate in situations where there would be no adequate domestic courts and where the international criminal court would therefore fill a gap. However, the view was expressed that that Convention, which was not yet in force, dealt with offences that did not have the same degree of seriousness as those categories of crimes provided for in the draft. Some delegations doubted the usefulness of the inclusion of the Convention within the court's jurisdiction.

85. It was suggested that a provision should be included in the statute to allow for periodic reviews of the list of crimes as a way of keeping it attuned to the requirements of the international community. A number of delegations expressed support for this suggestion.

(b) General rules of criminal law

86. The Committee considered various items listed in the guidelines for consideration of the question of general principles of criminal law, prepared by the Working Group (see para. 9 above), as set out in annex II to the present report.

87. As regards process issues, several delegations expressed support for a combined approach to the method of elaboration of the general rules of criminal law under which (a) the fundamental principles would be included in the statute or in an annex thereto; (b) other important issues would be addressed in the rules; and (c) questions of lesser importance could be determined by the court in a particular case, possibly by drawing upon the national law of a particular State or principles that were common to the major legal systems. This approach would enable the States parties to the statute to participate in the elaboration of the essential rules that would form part of the statute, as well as the elaboration of other important provisions to be included in the rules of the court. It would also give potential States parties a clear understanding of the

general legal framework in which the court would operate. Furthermore, it would provide clear guidance to the court, secure the degree of predictability and certainty required for the rights of the accused and the ability of defence counsel to respond to the charges to be fully respected, and promote consistent jurisprudence on fundamental questions of general criminal law, such as mens rea, principles of individual criminal responsibility and possible defences. The view was expressed that the nature of the crimes within the jurisdiction of the court should be taken into account when addressing the issues of the statute or the rules or the application by the court of general principles of criminal law. The statute of the International Tribunal for the former Yugoslavia did not, it was stated, provide an appropriate model for the elaboration or determination of general rules of criminal law in relation to a permanent court to be established on a consensual basis by the States parties to its statute. Some delegations, on the other hand, drew attention to the principles of general criminal law addressed in article 7 of that statute. Other delegations indicated that they had not yet taken a final position on the question.

88. With respect to the relevance of national law, some delegations expressed concern regarding the direct applicability of national law envisaged in article 33, subparagraph (c), of the draft statute in view of the uncertainty as to which national law should be applied and bearing in mind the divergences in national criminal laws. The view was expressed that it might be preferable for the court to take into account general principles of criminal law that were common to the major legal systems rather than relying on the national law of a particular State to resolve issues in particular cases which were not addressed in the statute or the rules of the court. Attention was also drawn to the differences in the criminal law and procedures of common-law and civil-law countries. While a preference was expressed by some delegations for the investigation approach of the latter, the remark was also made that an attempt should be made to find a generally acceptable and balanced approach, taking into account both types of legal systems.

89. Regarding substantive issues, a number of delegations expressed the view that the various questions identified by the Working Group deserved further examination and that consideration should be given to the possibility of including relevant provisions in the statute or in an annex thereto, in particular on general principles such as the principle of non-retroactivity and principles of individual criminal responsibility; the necessary intent or mens rea; the question of mental capacity; the various types of criminal responsibility; possible defences to the crimes within the jurisdiction of the court; the aggravating or mitigating circumstances that might affect the determination of an appropriate sentence; the penalties that might be imposed by the court; the discrepancy in the maximum penalty that might be imposed by the court and by national courts; and the inclusion of fines and other financial sanctions as possible penalties. A question was also raised as to the applicability of State defences to individual liability.

2. Exercise of jurisdiction

90. Commenting in general on the issue of the exercise of jurisdiction, a number of delegations drew attention to the close links between the various elements relevant to the issue (complementarity, jurisdiction, consent, triggering mechanism, role of the Security Council, etc.). The remark was also made that the question of how the court exercised its jurisdiction was central to how Governments would react to the statute: the extent of participation in

the statute, the credibility and independence of the court, its day-to-day functioning and the importance of its work would in large measure be determined by the way in which cases came before it for adjudication.

(a) Inherent jurisdiction

91. A number of delegations elaborated on their understanding of the concept of inherent jurisdiction. It was pointed out in this connection that, if the court was given inherent jurisdiction over a crime, then any State that became party to the statute would ipso facto accept that the court had the power to try an accused for that crime without additional consent being required from any State party. The remark was also made that inherent jurisdiction did not mean exclusive jurisdiction and would not strip States parties of the power to exercise jurisdiction at the national level and that the question of priority of jurisdiction would have to be resolved by the international criminal court on the basis of the principle of complementarity.

92. Some delegations objected to the inclusion of the concept of inherent jurisdiction in the statute on a number of grounds. In their view, the concept was incompatible with the principle of State sovereignty as embodied in Article 2, paragraph 1, of the Charter of the United Nations. The phrase "inherent jurisdiction" was furthermore viewed as involving a contradiction in terms inasmuch as the court's authority to exercise jurisdiction could only stem - at a time when the international criminal court was not yet in existence and where jurisdiction for the prosecution of the crimes concerned was vested in national courts - from the States parties' consent, expressed through the treaty or on a case-by-case basis. The concept of inherent jurisdiction was also considered as inconsistent with the principle of complementarity, under which the court was only intended to have jurisdiction where trial procedures at the national level were unavailable or would not be effective. The point was made in this connection that instead of assuming a priori that certain categories of crimes were better suited for trial by an international criminal court, it would be preferable to determine the circumstances when trial by such a court was appropriate. The remark was made in this context that the principle of complementarity needed to be much more fully developed than it was in the draft prepared by the International Law Commission and that the concepts of admissibility under article 35 and non bis in idem under article 42, which were paramount and must be applied in every case by the court, should be further elaborated in order to implement the principle of complementarity. With reference to the risk of conflicts of jurisdiction, the point was made that it would not be fair to give the international criminal court the power to settle such conflicts, nor would it be wise to place before it dilemmas from which it might come out with its dignity impaired.

93. Other delegations emphasized that inherent jurisdiction could not be viewed as incompatible with State sovereignty since it would stem from an act of sovereignty, namely, acceptance of the statute. The remark was also made that the crimes under consideration were crimes of international concern, the prosecution of which would be of interest to a number of States, if not to the international community as a whole, and that, in case the custodial State was unable to prosecute, insistence on sovereignty would affect the legitimate interests of other States. It was furthermore pointed out that the alternative solution - subordinating the exercise of jurisdiction by the court to a declaration of acceptance - would leave the future fate of the court in the hands of States on whose discretion the ability of the court to operate would depend. Concern was expressed that such an approach, apart from enabling States to manipulate the functioning of the court, would set aside the interests of the

international community - which could not be reduced to the sum total of the States forming part of it - and would prevent the court from playing its role as the guardian of international public order. With reference to the argument that inherent jurisdiction interfered with the principle of complementarity, the delegations in question stressed that inherent jurisdiction was not exclusive jurisdiction and that the court would have concurrent jurisdiction, i.e., would only intervene when it appeared to the court, on the basis of criteria to be clearly established in the statute, that national courts could not function adequately. The remark was made in this context that the effect of the principle of complementarity could only be, at most, to defer the intervention of the court, whereas rejection of the inherent jurisdiction concept would result in the court's complete inability ab initio to be seized of a case. As regards possible conflicts of jurisdiction, the remark was made that appropriate provisions could be included in the statute.

94. The approach of the International Law Commission to the issue of inherent jurisdiction, as reflected in article 21, 8/ was supported by several delegations. It was, however, viewed by some as inconsistent with the 1948 Convention on Genocide and by others as too restrictive.

95. Under the first set of criticisms, it was said that the 1948 Convention, to which most States were parties, did not envisage inherent jurisdiction and that the question arose whether the Committee had competence to engage in progressive development of the relevant substantive law. The Convention, it was further observed, envisaged the possible jurisdiction of an international criminal court over genocide only in the hypothesis of failure of national authorities to prosecute; a complaint from any State party to the Convention could not by itself trigger the jurisdiction of an international criminal court. It was accordingly suggested that the court should only be entitled to exercise jurisdiction over genocide if, within a given period from the commission of the crime, no State had initiated an investigatory process. The assumption underlying the approach of the International Law Commission that national courts would be less able or in a less favourable position to prosecute a crime of genocide was furthermore viewed as questionable.

96. In response to these views, the remark was made that the relevant Convention had not only confirmed, almost 50 years ago, the already accepted notion that genocide was a crime under general international law but had envisaged in its article 6 the creation of an international criminal tribunal competent to try that crime. The view was expressed in this context that the implementation of the letter and spirit of existing treaties that had come to embody general international law ought to have at least as much of a priority as the formulation of new norms and that it was difficult to see how the objectives of the 1948 Convention could be achieved if inherent jurisdiction was not conferred on the court.

97. Under the second set of criticisms, the Commission's approach was too restrictive and the sphere of inherent jurisdiction should encompass, in addition to genocide, other crimes under general international law. Such a broadening of the sphere of inherent jurisdiction would, it was observed, have less far-reaching consequences than might appear inasmuch as, for the court to have jurisdiction over the crimes concerned, the complainant State, the territorial State and the custodial State would all have to be parties to the statute. In favour of the suggested new approach, a number of delegations invoked the gravity of the so-called "core crimes" and the desirability of including them in the sphere of inherent jurisdiction if the new institution was to provide an adequate judicial answer to the concerns to which its creation was

intended to respond. It was pointed out in this connection that the Commission's approach lagged behind present-day requirements and led to legally untenable results since it made it possible to exclude from the jurisdiction of the court crimes that constituted violations of legal norms of the highest order, namely, rules of a jus cogens character, and, by way of consequence, to formulate a reservation to a jus cogens rule. It was also argued that extending the scope of inherent jurisdiction to crimes other than genocide would make it possible to simplify the rules on the exercise of jurisdiction and, for the crimes concerned, to do away with the requirements of a declaration of acceptance. The remark was made in this context that the requirement of State consent, as a building-stone for international jurisdiction, traditionally gave rise to a number of separate proceedings on the issue of jurisdiction alone and that inherent jurisdiction would limit the possibility of recurrent objections on the competence of the court - in particular with regard to the interpretation in each particular case of the provisions of article 22 - and thereby contribute to eliminating substantial delays in trial proceedings. Emphasis was also placed on the fact that more than 185 countries already had jurisdiction over serious crimes of international concern addressed by the 1948 Convention: universal jurisdiction had thus already been given away to every State in the world and the question was whether it should also be given to a just, fair and effective international court which States could agree to set up or not by signing its statute.

98. The delegations favouring the suggested new approach generally agreed that the sphere of inherent jurisdiction should extend to crimes against humanity and to war crimes, the latter category being intended to encompass, according to a number of delegations, not only serious violations of the laws and customs of war, but also crimes under the 1949 Geneva Conventions. Some delegations strongly argued in favour of adding aggression to the two above-mentioned categories of crimes. Others were of a different opinion. The views on this issue are reflected in more detail in paragraphs 63-71 above.

99. A number of delegations, while reserving their position on the matter, expressed readiness to envisage inherent jurisdiction for the "core crimes" subject to the inclusion in the statute of satisfactory provisions on complementarity.

100. Other delegations objected to extending the sphere of inherent jurisdiction to crimes other than genocide. It was noted in particular that, although the draft prepared by the International Law Commission was the basic proposal before the Committee, the discussion had brought to light an alternative model which ignored the contemporary realities at the international level. The presumption that States would agree by signing a treaty to defer to the court mandatory jurisdiction over the "core crimes" was viewed as highly questionable and concern was expressed that, when the matter of ratifying the statute was before national parliaments, very few Governments would agree to such mandatory jurisdiction. Reference was made in this context to the lessons to be drawn from the record of acceptance of the compulsory jurisdiction of the International Court of Justice. It was also said that the issues of sovereignty raised during the course of the debate could not be disposed of by providing for a single expression of consent at the time of acceptance of the statute and that, for the membership of the court to have the required broad geographical basis, the concerns of all regions should be duly taken into account.

101. The proponents of the extension of the sphere of inherent jurisdiction to the "core crimes" indicated that such extension could have as a corollary the exclusion from the subject-matter jurisdiction of the court of treaty-based

crimes - an approach that would make it easier to achieve the goal of complementarity. They did not, however, exclude the possibility of retaining the latter crimes and bringing them under the jurisdiction of the court by way of a declaration of acceptance, on the basis of the opting-in or opting-out system.

(b) Mechanism by which States accept the jurisdiction of the court

102. As regards the distinction made in article 22 between acceptance of the statute and acceptance of the jurisdiction of the court, reservations were expressed on the opt-in approach, which, it was stated, leaned too much on the side of conservatism to the detriment of the interests of the international community and might leave the court with a very narrow field of competence and thus run counter to the general aim of the statute. Some delegations, however, expressed preference for the opt-in approach, which would promote broader acceptance of the statute and make it easier to present national legislation organs with convincing arguments on a case-by-case basis. Several delegations favoured adopting an opt-out approach for the "core crimes" while retaining the opt-in approach for lesser crimes and crimes to be brought within the jurisdiction of the court at a later stage. Such a combination, it was argued, would give the court a jurisdiction of reasonable scope and make it more responsive to the current needs of the international community. It was also suggested that article 22 should make it clear whether ratification of the relevant treaty was a prerequisite to the acceptance of the corresponding jurisdiction of the court.

(c) State consent requirements and conditions for the exercise of jurisdiction

103. Paragraph 1 (b) of article 21 was viewed by some delegations as well balanced and consistent with the consensual basis of the court's jurisdiction. Other delegations felt that, to avoid subjecting the operation of the court to undue restrictions, the consent requirement should be limited to the territorial State, which had a particular interest in the prosecution of the case, or to the custodial State, whose consent was necessary for the court to obtain custody of the accused. Still other delegations took the view that the consent requirements should be extended to additional States which could have a significant interest in a case, including the State of nationality of the victim, the State of nationality of the accused and the target State of the crime. It was also suggested that consideration should be given to the interests of States in specific categories of cases and to the need to obtain the consent of the custodial State at the time of arrest. The view was expressed that the provision would need to be further examined in conjunction with article 20 and paragraph 1 (a) of article 21.

104. A number of delegations emphasized that, for practical reasons, only the consent of the State in whose territory the crime was committed or of the custodial State, as provided in article 21, was necessary. They were in favour of keeping to the minimum the number of States whose consent would be needed for the international criminal court to exercise jurisdiction. They pointed out that the international criminal court could not conduct an effective prosecution without the cooperation of the territorial State, nor could a prosecution be conducted unless the alleged offender was surrendered to the court by the custodial State. The point was further made that, under general international law, the custodial State was in a key position to determine who should prosecute a crime. It would be necessary to determine how much of this power the custodial State should cede to the international criminal court.

105. The requirement for the consent of the State of nationality of the accused was considered by some delegations necessary not only because some States might be constitutionally barred from extraditing their own nationals, but also because of an anomaly that would result if a complaint could be brought before the court against a person based solely on the acceptance of the jurisdiction of the court by the custodial State and by the territorial State while the acceptance of the jurisdiction by the State of nationality to which the accused owed allegiance and which had jurisdiction over the accused would not be required. Other delegations felt that the requirement of consent of the State of nationality would complicate the exercise of jurisdiction by the international criminal court in cases of multiple offenders.

106. The view was also expressed that in cases of international conflict it was not acceptable to give all control to the territorial State, which might be only one party to the conflict. In the case of terrorism, moreover, the State against which the act was politically directed was concerned as well.

107. The comment was further made that the question of State consent should be examined from the perspective of a basic goal of the planned court: to allow and to encourage States to exercise jurisdiction over the perpetrators of a particular crime. Only when such States were unable to exercise jurisdiction should the international criminal court be called upon to intervene. This approach was found by some delegations to be consistent with the concept of complementarity.

108. As regards paragraph 2 of article 21, the view was expressed that a requesting State or a sending State entitled to assert jurisdiction under an extradition treaty or a status-of-forces agreement, respectively, should be able to prevent the court from exercising jurisdiction even if the custodial State denied the request to surrender a suspect. However, the view was also expressed that the legal basis for requiring such consent was questionable; that attention should be paid to situations in which an extradition request was denied without legal justification or was a pretext for requiring the requesting State's consent; and that the complexities of status-of-forces agreements called for further consideration. Care should be taken not to create irreconcilable obligations for States.

109. The view was expressed that the provisions of article 35 should be viewed as preconditions for the exercise of jurisdiction by the court in all cases, rather than in terms of a discretionary power to be exercised by the court in certain situations. It was suggested that the principle of complementarity should be reflected more clearly in the form of a precondition to ensure that the court would not interfere with the legitimate investigative activities of national authorities or exercise jurisdiction when a State was willing and able to do so, including under bilateral extradition treaties or status-of-forces agreements. Also in relation to the complementary role of the court, it was suggested that national courts should have priority as regards violations of international humanitarian law and alleged crimes of their armed forces involved in United Nations operations. Other comments included: (a) that subparagraph (a) should be redrafted to provide that a case would be inadmissible if it had been duly investigated by a State and there was no reason to believe that the decision of that State not to prosecute was not well founded; (b) that subparagraph (c) of article 35 should be revised to be consonant with the second paragraph of the preamble; (c) that grounds deriving from the principle non bis in idem (art. 42, para. 2) and from the rule of speciality (art. 55) should also be included among grounds for inadmissibility; and (d) that a vexatious complaint constituting an abuse of legal process, or

unjust prosecution, taking into account the circumstances of the accused such as age or ill-health, should also be considered inadmissible.

110. It was pointed out that the draft statute provided for two forms of consent: a State could consent to the jurisdiction of the international criminal court by a declaration of general consent as provided for in article 22, paragraph 1, or by an ad hoc declaration, as stipulated in article 22, paragraph 2. It was noted that the draft statute did not treat a third form of consent: consent with respect to particular crimes. A related issue, not yet considered, it was observed, was whether State consent was a precondition for prosecution by the international criminal court of a particular crime, and whether such consent was among the factors and elements to be considered by the court in determining whether it should exercise jurisdiction or yield to national jurisdiction. In this context, the comment was made that the draft statute should distinguish between consent to prosecution and consent to jurisdiction, inasmuch as consent to jurisdiction might not always be consent to prosecution in a particular case.

111. It was further noted that, in so far as consent implied cooperation, various situations had to be envisaged. The consent of the territorial State might not be crucial in certain circumstances, e.g., peace-keeping operations or belligerent occupation. There were also situations, e.g., belligerency between two States where the same State was at once the custodial State, the territorial State and the State of nationality.

(d) Trigger mechanism

112. As regards the complaint envisaged as a trigger mechanism under articles 21 and 25, some delegations expressed the view that any State party to the statute should be entitled to lodge a complaint with the prosecutor with respect to the serious crimes under general international law that were of concern to the international community as a whole, referred to in article 20, subparagraphs (a) to (d). It was further suggested that complaints with respect to the crime of genocide as a crime under general international law should not be limited to States parties to the relevant convention. However, the view was also expressed that only the States concerned that had a direct interest in the case, such as the territorial State, the custodial State or the State of nationality of the victim or suspect, and were able to provide relevant documents or other evidence should be entitled to lodge complaints to avoid the substantial costs involved in a lengthy investigation in response to frivolous, politically motivated or unsubstantiated complaints. It was also suggested that the consent of a group of States whose size would be proportional to the number of States having accepted the jurisdiction of the court should be obtained before the prosecutor initiated an investigation, or as soon as the relevant States were identified, to avoid wasting efforts on the investigation of cases over which the court would not be able to exercise jurisdiction. There were further suggestions that the complainant should be a State party to the relevant convention and should pay some portion of the costs of the proceedings. A number of delegations opposed the latter suggestion. It was further suggested that the complaint should not automatically trigger the jurisdiction of the court without notice being given to the States concerned and a determination having been made as to whether any State was willing and able to effectively investigate and prosecute the case.

113. Some delegations felt that the role of the prosecutor should be more fully elaborated and expanded to include the initiation of investigation or prosecution in the case of serious crimes under general international law that

were of concern to the international community as a whole in the absence of a complaint. These delegations were of the view that this expanded role would enhance the independence and autonomy of the prosecutor, who would be in a position to work on behalf of the international community rather than a particular complainant State or the Security Council. In this regard, attention was drawn to the limited role played by state complaints in the context of certain human rights conventions. Reference was also made to the more prominent role assigned to the prosecutor of the ad hoc Tribunals, who was authorized to initiate an investigation ex officio or on the basis of information obtained from any source, including States, international organizations and non-governmental organizations.

114. There were different views as to whether the proposed expanded role of the prosecutor would be consistent with the functions of the procuracy as envisaged in article 12 of the draft statute, which was similar to the corresponding provisions of the statutes of the ad hoc tribunals. It was suggested that consideration be given to the implications of such a role on other provisions of the draft statute, including those relating to the question of determining the admissibility of a case under article 35. Opinions also differed as to whether, in the absence of a State complaint, it would be appropriate for the prosecutor to initiate an investigation: according to one view, the absence of such a complaint was an indication that the crime was not of sufficient gravity or concern to the international community; according to another view, it might mean that the States concerned were unable or unwilling to pursue the matter.

115. Regarding paragraph 3, the view was expressed that the threshold for initiating an investigation was too low since a State could file a complaint without conducting any investigation or providing any proof and that the prosecutor was not given sufficient discretion to determine whether a complaint warranted initiating an investigation by the court without exonerating the suspect for purposes of national prosecution. With regard to article 26, the view was also expressed that a higher threshold should be required for the initiation of an investigation following a complaint or, alternatively, that the prosecutor should be given broader discretion to determine whether to initiate an investigation.

116. As regards article 27, the remark was made that the authority of the prosecutor to file indictments under the article required further consideration with respect to the principle of complementarity.

117. There was a further suggestion that the victims of crimes or their relatives be authorized to trigger the jurisdiction of the court if three criteria were met, namely, (a) the crimes were within the jurisdiction of the court; (b) the territorial State was a party to the statute and had accepted the jurisdiction of the court with respect to the crime; and (c) the court was entitled to initiate an investigation or prosecution in conformity with the principle of complementarity. In this regard, it was also suggested that a special commission should be established within the court to review complaints filed by individuals and to determine before the initiation of any further action whether the necessary criteria were met so as to avoid overloading the court.

118. The view was expressed that it might be appropriate to consider different trigger mechanisms for different categories of crimes. The view was also expressed that the paragraph should be further considered in the light of the appropriateness of the so-called "inherent jurisdiction" concept.

119. Several delegations emphasized the relationship between the question of the trigger mechanism for the exercise of jurisdiction and other issues such as the position of State consent requirements and that of the mechanism by which States would indicate their consent.

(e) Role of the Security Council

120. As regards article 23, paragraph 1, of the draft statute, several delegations were of the view that the Security Council should be authorized to refer matters to the court to obviate the need for the creation of additional ad hoc tribunals and to enhance the effectiveness of the court as a consequence of referrals made under Chapter VII of the Charter of the United Nations. The role envisaged for the Security Council was described as consistent with its primary responsibility for the maintenance of international peace and security and its existing powers under the Charter as reflected in recent practice. The Council, it was observed, would merely refer a general matter or situation to the court, as opposed to bringing a case against a specific individual - which would preserve the independence and autonomy of the court in the exercise of its investigative, prosecutorial and judicial functions. In this regard, reference was made to the modus operandi of the two ad hoc Tribunals established by the Security Council. The view was expressed that the intervention of the Security Council in triggering the jurisdiction of the court under the paragraph under consideration would be particularly relevant if the jurisdiction of the court were limited to the most serious crimes that might threaten international peace and security. It was observed that the provisions of this paragraph might help to solve the issue of extending the jurisdiction of the court to several treaty-based crimes, in particular, terrorist acts. It was also suggested that the elimination of the Council's role as envisaged in that paragraph would necessitate a more complex State consent regime, which would have the further drawback of resting on the political agenda of individual States rather than on the collective decision of the Security Council. There were different views as to whether a Security Council referral should obviate the need for State consent, as envisaged by the phrase "notwithstanding article 21" as well as the commentary to the article. A question was also raised concerning the effects of a Security Council referral in terms of the possible primacy of the court's jurisdiction and the concurrent jurisdiction of national courts under the principle of complementarity, with attention being drawn to the statutes of the ad hoc tribunals in this respect.

121. Several other delegations expressed serious reservations or opposition to the role envisaged for the Security Council, which, in their view, would reduce the credibility and moral authority of the court; excessively limit its role; undermine its independence, impartiality and autonomy; introduce an inappropriate political influence over the functioning of the institution; confer additional powers on the Security Council that were not provided for in the Charter; and enable the permanent members of the Security Council to exercise a veto with respect to the work of the court. The necessity of envisaging a role for the Security Council in relation to a permanent court was also questioned on the ground that States parties to the statute could trigger the jurisdiction of the court by means of filing a complaint, with the prosecutor acting as a filter or screening mechanism with respect to frivolous complaints. The remark was also made that a distinction should be drawn between the ad hoc Tribunals instituted by the Security Council under Chapter VII and the future permanent court to be established on a consensual basis by the States parties to its statute.

122. With reference to paragraph 2 of article 23, some delegations were of the view that the role envisaged for the Security Council was appropriate and necessary in view of Article 39 of the Charter. Emphasis was placed on the need to draw a clear distinction between a finding of aggression by the Council with respect to a State and a determination of individual criminal responsibility by the court and to keep in mind the differences between the mandates to be performed independently by the two bodies. In this regard, it was suggested that the court should not be able to question or contradict a finding of the Security Council. There were different views on the extent to which the court should be permitted to consider a plea of self-defence raised by the accused since a Security Council finding under Article 39 would have clear implications with respect to Article 51 of the Charter.

123. Other delegations expressed serious concern regarding paragraph 2. It was argued in particular that the judicial functions of the court would be unduly curtailed with respect to the determination of the existence of the crime of aggression as well as the defences that could be considered in relation to the question of individual criminal responsibility; the independence and impartiality of the court would be undermined by its dependence on the finding of a political body; the court could be precluded from performing its functions with respect to the crime of aggression as a result of the exercise of the veto by a permanent member of the Security Council; the work of the court in terms of the investigation and prosecution of the crime of aggression could also be impeded or delayed as a result of the failure of the Security Council to make an express finding of aggression. It was also mentioned that paragraph 2 of article 23 would be superfluous in any case if the crime of aggression were not covered under article 20. The point was further made that no provision similar to paragraph 2 was to be found, in relation to the International Court of Justice, in the Charter of the United Nations or the Statute of the Court. Some delegations felt that paragraph 2 should be deleted, possibly together with article 20, paragraph (b). 9/

124. Paragraph 3 was viewed by some delegations as necessary to prevent the risk of interference in the Security Council's fulfilment of its primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, with attention being drawn to the priority given to the Council in this regard under Article 12 of the Charter. The remark was made that the role of the Security Council with respect to the maintenance of international peace and security could eclipse the judicial functions of the International Court of Justice in some situations.

125. Other delegations expressed serious reservations concerning paragraph 3 in relation to the prerogative conferred on the Security Council by article 23 of the draft statute as regards the activation of the court, bearing in mind the political character of the organ in question. It was observed in particular that the judicial functions of the court should not be subordinated to the action of a political body. Concern was also voiced that the court could be prevented from performing its functions through the mere placing of an item on the Council's agenda and could remain paralysed for lengthy periods while the Security Council was actively dealing with a particular situation or retained the item on its agenda for possible future consideration. The necessity of the provision was also questioned on the ground that no similar priority was given to the Security Council under Article 12 of the Charter with respect to judicial decisions on legal questions to be rendered by the International Court of Justice.

126. Still other delegations expressed the view that the current text was too vague and should be reformulated so as to expressly limit the application of the paragraph to situations in which the Council was taking action with respect to a particular situation, as indicated in the commentary to the article. Other issues that were viewed as calling for further consideration included: the criteria or method for determining when the Security Council should be considered as actively seized of, or performing its responsibilities with respect to, a particular situation for the purposes of paragraph 3; the question of whether the paragraph should apply to situations in which the Security Council was performing its responsibilities under so-called "Chapter VI and a half" as well as Chapter VII; the relationship between the said paragraph and paragraph 1; and the implications of the Security Council assuming its responsibilities with respect to a particular situation after the court had commenced investigations or judicial proceedings relating to the same situation

(f) Statute of limitations

127. Some delegations felt that the question of the statute of limitations for the crimes within the jurisdiction of the court should be addressed in the statute in the light of divergences between national laws and bearing in mind the importance of the legal principle involved, which reflected the decreasing social importance of bringing criminals to justice and the increasing difficulties in ensuring a fair trial as time elapsed. However, other delegations questioned the applicability of the statute of limitations to the types of serious crimes under consideration and drew attention to the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

D. Methods of proceedings: due process

128. The present summary endeavours to list the main issues raised with regard to Parts 4 (Investigation and prosecution), 5 (The trial) and 6 (Appeal and review) of the draft statute during the Ad Hoc Committee's debate on 6 April 1995. It reflects only the views expressed and the proposals made in that debate, and is presented without prejudice to the written comments on the draft statute as contained in document A/AC.244/1 and Add.1-4 as well as to the comments reflected in document A/CN.4/464/Add.1, or to any other views or proposals that delegations may wish to put forward.

1. General observations

129. The question of the methods of proceedings was viewed as going beyond technical concerns and touching upon fundamental aspects of the proposed institution. It was felt essential to bear in mind, first, that the court, in view of the considerable powers it would enjoy in relation to individuals, should be bound to apply the highest standards of justice, integrity and due process; secondly, that the demand for due process was of special cogency in relation to defendants involved in proceedings conducted away from their home country and away from where the evidence and witnesses were readily available; and thirdly, that precedents would be scarce or unavailable. Emphasis was placed on the need to have the rules of the court prepared by States rather than by the judges and to have them eventually adopted by States parties to the statute.

130. The remark was made that in drafting the statute the International Law Commission had drawn inspiration from common-law practice. Bearing in mind that both the civil-law and common-law systems would be represented on the court, it was felt necessary to give appropriate reflection to both systems in the statute as well as in the rules of the court.

131. There seemed to be a general agreement that the articles on due process as formulated by the ILC served as a useful point of departure for the further deliberations. However, as was evidenced by the debate, there was a need for further elaboration of those articles as well as further work on the rules of evidence and procedure, and for determining whether such rules should be elaborated in conjunction with the statute itself. Referring to the intention expressed in the third paragraph of the preamble to the statute that the court was to "be complementary to national criminal justice systems", several delegations highlighted the difficulties involved in establishing an adequate relationship between the court and national authorities for the purpose of implementing the provisions of the statute on due process.

132. It was generally recognized that Part 4 (Investigation and prosecution) should be carefully reviewed to ensure, inter alia, a proper balance between two concerns, namely effectiveness of the prosecution and respect for the rights of the suspect or the accused. Emphasis was placed on the need to formulate the provisions on due process in such a way as to allow for the application of standards contained in relevant human rights instruments. Some concern was voiced, particularly in relation to articles 28, 30 and 46, that the statute drew extensively on the common-law system, even though the civil-law system might afford greater protection to the suspect or the accused at the early stage of investigation or prosecution.

133. It was pointed out that some issues, such as that of the powers of the Presidency, were not confined to one article and needed to be examined comprehensively. The remark was also made that the role of the Security Council under Part 4, for example in relation to article 25, paragraph 4, and article 26, paragraph 5, would depend upon the nature and extent of the court's jurisdiction, to be defined in Part 3 of the draft statute. Attention was also drawn to the complex interplay between, and division of, responsibilities of the court and those of the national authorities which required a further analysis in the context of several articles, including articles 28, 29, 35, 38 and 42.

2. Specific issues

Article 25

134. The general point was made that the precise formulation of this article would have to be determined in the light of the outcome of the discussion on the jurisdiction of the court under Part 3.

135. A proposal was made that there should be a certain minimum number of States before a complaint could be lodged under the article, as opposed to individual States.

136. Paragraph 3 was viewed by several delegations as calling for further scrutiny to prevent the submission of frivolous cases or cases for purely political reasons. In this connection, it was suggested that the phrase "as far as possible" should be deleted.

Article 26

137. The remark was made that the relationship between investigations conducted under national procedures and those carried out in relation to the same conduct under the present article called for a careful review. Attention was drawn to the relevance, in this context, of issues addressed in article 35.

138. The view was expressed that the prosecutor, in investigating alleged crimes under paragraph 2, should act in conformity with established practice in matters of international judicial assistance. The provision enabling the prosecutor to conduct on-site investigations gave rise to special concern; it was argued that the provisions should be brought in line with the established practice of cooperation and judicial assistance, as well as with constitutional requirements of certain States.

139. Paragraphs 3 and 5 were considered by some delegations as further examples of overly broad powers of the Presidency and as requiring further examination to ensure that they were fully consistent with the principle of "complementarity". The question was asked whether safeguards for the rights of witnesses should not be provided.

140. As regards paragraph 4, it was suggested that the limits of the prosecutor's discretion to decide not to prosecute should be clarified, taking into account, in particular, issues on inadmissibility addressed in connection with article 35. It was generally felt that similar concerns arose in relation to the provisions of article 27, paragraphs 1 and 4, relating to the filing, confirmation or amendment of an indictment.

141. With respect to paragraph 5, the point was made by some delegations that States parties to the statute having accepted the jurisdiction of the court should have the possibility to participate in the review of the prosecutor's decision.

142. Doubts were expressed about paragraph 6. It was asked, in particular, whether subparagraph (a) (i) was not going beyond what was strictly necessary, whether the suspect should not be entitled to be informed of the charge against him or her, and whether subparagraph (b) was appropriate. The remark was made that these issues were also relevant to article 43.

Article 27

143. A substantial number of delegations expressed concern over the broad powers of the Presidency with respect to indictments. There was a view that these powers undermined the independence of the prosecutor.

144. Emphasis was placed on the need to clarify the prosecutor's discretion to file and possibly amend the indictment. It was suggested that the suspect should be entitled to be heard, in order to ensure that the amendment of indictment did not infringe upon his or her rights.

145. With respect to paragraph 5, the remark was made that attention should be paid to the disclosure of sensitive information because of possible adverse consequences. It was pointed out that the same issue arose in the context of article 38, paragraph 4, and article 41, paragraph 2.

Article 28

146. There was extensive discussion on the issue of provisional arrest which brought forward the difficult problem of the division of responsibilities between the court and national judicial systems. It was noted that the problem arose in the context of article 30 as well. Concern was expressed over the permissible length of detention and the consequences of its expiry, the powers of the Presidency, the adequacy of criteria for arrest and the consequences of release from arrest. The legal basis for the provisional arrest of a suspect was also queried.

Article 29

147. With respect to the pre-trial stage, the nature of the proceedings before the national judicial officer and the extent of the rights of the suspect were viewed as calling for clarification. The question was asked whether the article should lay down specific standards for the protection of the rights of the suspect. In this connection the question was asked whether the article should not reflect or represent a more balanced division of responsibilities between the international criminal court and national authorities. Attention was also drawn to the constitutional problems which some States would face, and to the practical difficulties which many States would encounter with the article as currently drafted, in achieving such a balanced division.

148. Practical and constitutional concerns were expressed, in particular with respect to paragraph 2.

149. Concern was expressed about the need to clarify the meaning of provisional arrest and its relationship to other forms of arrest throughout the statute. Attention was drawn to the need to keep to a minimum the duration of detention following arrest, as well as to provide procedures for dealing with applications for release.

150. As regards paragraph 3, the point was made that the issue of compensation also arose in relation to provisional arrest (art. 28) and in case of exoneration (arts. 45 and 50).

151. Questions were furthermore raised as to the eligibility for, and mechanics of, compensation as well as the need to identify the authorities which would be liable for payment.

152. The article was also viewed as insufficiently detailed with respect to procedures at the pre-trial stage and it was stated that more detailed provisions were required, including those on arrest, detention and appearance before, and so also the role of, the judicial authorities.

Article 30

153. The duty imposed on the prosecutor in paragraph 1 raised once again the difficulties involved in reconciling the respective responsibilities of the international criminal court and those of national authorities. Particular difficulty arose over the uncertainty as to which jurisdiction, the national one or that of the court, should govern provisional arrest. Furthermore, it was reiterated that the suspect should be served with the indictment prior to its confirmation.

Article 31

154. A question was raised as to the extent to which persons made available to the prosecutor to assist in a prosecution would have the power to act; this was seen as connected with the problem of the overall powers of the prosecutor, as already referred to in paragraph 138 above in connection with article 26.

Article 33

155. This provision was mostly discussed in connection with issues pertaining to jurisdiction and has therefore been left out of the purview of the present summary.

Article 34

156. The reference to "interested State" was viewed as calling for clarification. The timing of challenges, in particular after the commencement of the hearing, and the locus standi to make challenges in that phase of the trial gave rise to divergent opinions.

Article 35

157. This provision was considered as one which should give clear expression to the principle of "complementarity".

158. It was suggested that the various grounds of inadmissibility, including those covered by articles 42 and 55, should be grouped in a separate part of the statute.

159. With reference to the word "may" in the introductory phrase of this article, the view was widely held that there should be no discretion for the court to declare a case admissible if the grounds for inadmissibility had been duly made out.

160. The previous calls for a clarification of the term "interested State" were reiterated in the present context.

161. It was also remarked that the wording of the article needed to be reviewed in the light of article 27.

162. Whereas subparagraph 9 (a) was viewed by some delegations as redundant in the light of article 26, paragraph 1, others proposed the insertion of additional grounds of inadmissibility such as acquittal after a properly brought case. Subparagraph (b) was considered as problematic in so far as its wording gave rise to divergent interpretations. As for subparagraph (c), the question of the entitlement of the accused to invoke insufficient gravity was raised. There was also a view that the subparagraph should be deleted.

Article 36

163. Some delegations raised the question whether further parties should have the right to be heard, in particular in the exercise of the right of diplomatic protection by the State of which the accused was a national.

Article 37

164. The rule that the accused should be present during the trial was widely endorsed. Some delegations, which invoked, inter alia, constitutional reasons, argued that the rule should not be accompanied by any exceptions. For others, exceptions should only be permitted in clearly specified circumstances.

165. Paragraph 2 as a whole was viewed by some delegations as too broad or imprecise, but was considered by others as striking an adequate balance between the rule and the exceptions.

166. With reference to subparagraph (a), reservations were expressed on the appropriateness of the ground of "ill-health" and it was queried whether, at least in some cases, this ground would not already amount to incapacity to stand trial. 10/ Whether reasons of security had a place in this context was also questioned.

167. With reference to paragraph 4, the need for an Indictment Chamber was queried and it was suggested either to delete the paragraph or to establish a permanent indictment chamber which would take over the powers of the Presidency such as those under article 27.

168. It was furthermore proposed to limit the function of an Indictment Chamber in in absentia proceedings to the preservation of evidence. In this context, concern was expressed about the subsequent use of evidence and attention was drawn to the desirability of providing safeguards to protect the rights of the accused. To some delegations, this article also raised the question of the entitlement of the accused to legal representation before the Indictment Chamber.

Article 38

169. A number of delegations reiterated in the context of this provision their view that the draft was not explicit enough on procedures and that more details should be provided, possibly through the rules of the court.

170. With reference to paragraph 1 (d), the notion of "plea of guilty or not guilty" gave rise to criticisms. The view was expressed by some delegations that the effect of a guilty plea would need to be spelled out in view of the differences between civil-law and common-law systems. The remark was made that, in view of the gravity of the crimes within the jurisdiction of the court, it would be inappropriate to permit plea bargaining.

Article 39

171. Attention was drawn to the need to define more precisely the concept of treaty applicability so as not to infringe upon the principle of nullum crimen sine lege. It was generally asked, in relation to the treaty crimes referred to in article 20 (e), whether ratification or accession by a certain State was necessary for a treaty to be applicable for the purpose of the statute. The question was also raised whether, once a person had been handed over to the court, the relevant treaty remained applicable in the sense of subparagraph (b), despite the fact that the court was not a party to the relevant treaty.

172. Subparagraph (a) raised the problem of the non-retroactive applicability of penal provisions and was viewed as calling for further examination once the final shape of article 20 had been determined and for certain redrafting. A

view was expressed that the qualification of a crime under international law seemed redundant in view of the reference to article 20 (a) to (d).

Article 41

173. A substantial number of delegations stressed the need to guarantee minimum rights for the accused in conformity with article 14 of the International Covenant on Civil and Political Rights.

174. Consequently, it was argued that a special regime should be provided for juveniles in accordance with that article.

175. The issue of mandatory legal assistance was viewed as particularly important in view of the seriousness of the crimes within the jurisdiction of the court. Emphasis was placed in this context on the need to establish rules on the qualifications, powers and remuneration of defence attorneys and on the procedure governing the appointment of court-assigned attorneys.

176. The views expressed in the context of article 27 on the limits to be placed on the disclosure of sensitive information were reiterated in the context of paragraph 2.

Article 42

177. The crucial importance of the non bis in idem principle in the interplay between national jurisdiction and the jurisdiction of the court was widely recognized. In this context one view was however expressed that article 42 in its current form came close to undermining the principle of "complementarity". The appropriateness of empowering the court to pass judgement on the impartiality or independence of national courts was seriously questioned.

178. Certain countries raised constitutional difficulties with regard to this provision.

179. With reference to subparagraph (a) of paragraph 2, some delegations expressed serious reservations about a criterion based on the concept of "ordinary crime". It was proposed to delete the subparagraph.

180. Subparagraph (b) was considered by some delegations as too vaguely formulated and as involving subjective assessments.

Article 43

181. This provision was viewed by a few delegations as calling for further elaboration, particularly with regard to the protection of victims and witnesses. Also noted was the need to consider the rights of the accused in this context.

Article 44

182. There was a general feeling that this article required further scrutiny in the framework of the statute and/or in the context of the rules of the court.

183. As regards paragraph 2, it was widely held that cases of perjury should be prosecuted by the international criminal court rather than by national courts.

184. Several delegations supported the principle set forth in paragraph 5. The view was however expressed that careful attention should be paid to the way in which the provision would operate in practice and it was suggested that the grounds for inadmissibility of evidence should be more narrowly circumscribed.

Article 45

185. As regards paragraph 1, several delegations felt that the presence of all members of the Trial Chamber should be required throughout the proceedings. With reference to paragraphs 2 and 5, the question was raised whether judges should be entitled to deliver separate or dissenting opinions. Divergent views were expressed in this connection. It was noted that the issues of the quorum and dissenting opinions would also arise in connection with article 49.

186. As to paragraph 3, questions were raised concerning the meaning of the expression "sufficient time" and as to what should be the consequence of the failure of the Trial Chamber to agree on a decision.

Article 47

187. In the view of many delegations, this article gave rise to a serious problem with regard to its conformity with the principle nulla poena sine lege. It was generally held that there was a need for maximum penalties applicable to various types of crimes to be spelled out. The view was also expressed that minimum penalties should also be made explicit in view of the seriousness of the crimes. It was also proposed to introduce criteria as to the choice of appropriate penalty.

188. With regard to paragraph 1, the exclusion of the death penalty was supported by many delegations. Some delegations suggested provision for such exclusion, while one delegation proposed that the death penalty be included in the list of possible penalties. It was suggested that suspension of penalties should be addressed. A number of delegations wondered whether a fine would be commensurate with the seriousness of the crimes under the jurisdiction of the court. Some delegations further questioned the enforceability of fines and asked whether failure to pay could lead to the imposition of a term of imprisonment. Proposals were also made that the statute should provide for confiscation, restitution of property and compensation for victims.

189. Paragraph 2 gave rise to serious concern on the part of many delegations owing to the lack of certainty regarding the law to be applied. There was a proposal to apply only the law of the State where the crime had been committed; another proposal was to apply exclusively the law of the State of the nationality of the accused.

190. Several delegations suggested the need for further consideration of paragraph 3. Concern was expressed, in particular, as to the appropriateness of subparagraphs (a) and (b).

Article 48

191. A number of delegations questioned the adequacy of, or necessity for, the grounds for appeal as laid down in this article.

Article 49

192. A number of delegations thought it necessary to introduce a time-limit for the lodging of an appeal.

Article 50

193. The question was raised whether the grounds for revision listed in article 50 were broad enough to accommodate developments in relevant national law. Concern was also expressed that the article did not contain any provisions regarding compensation for the wrongly convicted person, bearing in mind the provisions of article 14, paragraph 6, of the International Covenant on Civil and Political Rights.

3. Additional remarks

194. Some delegations thought it necessary to provide for sanctions and other consequences, including compensation, in case of misconduct of the prosecutors, judges or other officers of the court.

E. Relationship between States parties, non-States parties and the international criminal court

195. Discussion of topics under this subheading was based on the guidelines prepared by the Working Group (see para. 9 above), as set out in annex I to the present report.

1. General issues

196. It was widely recognized that the question of cooperation between States and the court was intrinsically linked with that of the relationship between the provisions of the statute and their implementation under national law, and the nature and extent of obligations of States to guarantee such cooperation. Given the importance and complexity of that relationship, it was suggested that the basic elements of the required cooperation be laid down explicitly in the statute itself.

197. It was emphasized that the effectiveness of the international criminal court would depend largely on the cooperation of national jurisdiction through the organs of which requests of the court for assistance would primarily have to be put into effect. It was suggested that only in limited circumstances, where national jurisdiction failed to provide such assistance, would the question of the court's direct exercise of its investigative powers in the territory of the State, either on its own or through agents of the State acting on its behalf, arise.

198. Strict adherence to the principle of complementarity was considered particularly important in defining the relationship and cooperation between the court and national authorities. It was further stated that the role to be played by the principle of complementarity in this connection was ultimately connected with other issues such as the overall scope and nature of the jurisdiction of the court, the regime of States' consent, or the trigger mechanism, to be provided under the statute.

199. The view was expressed that the choice of cooperation to be afforded to the international criminal court and the nature and extent of obligations of States to assist would have a significant bearing not only on issues of sovereignty and constitutional laws of many States, but also on the effective functioning of the court itself. It was noted that neither complete reliance on national laws and practices nor direct implementation and enforcement of the statute by the court itself would be a reasonable option. The appropriate option, it was suggested, was to establish a mechanism for effective cooperation, built on existing regimes of cooperation and judicial assistance, with full regard to the requirements of national laws and procedure, adjusting them, as required, to the special character of cooperation between the court and States. Mention was also made of the possibility of providing for an entirely new regime which would not draw upon existing extradition and judicial assistance conventions.

200. It was further recognized that the divergence of national laws and procedures would call for a flexible scheme, providing viable options and sub-schemes to allow for variations in national requirements, as opposed to a rigid and monolithic scheme. The question was however raised as to the need for guaranteeing a homogeneous system for all or some forms of cooperation between the court and national authorities in the relationship between the national law and the law of the statute. The view was also expressed that any impediments arising from the application of existing regimes of cooperation or considerations of national constitutional requirements should be clearly identified for the purpose of devising appropriate schemes for cooperation.

201. As regards the extent of obligations of States parties to assist, the view was widely shared that such obligations could not be absolute since, under the principle of complementarity, States would have the discretionary power of deciding whether or not to comply with the court's request for assistance. In this connection, concern was expressed regarding the presumption made in the draft statute of the primacy of the requests of the international criminal court in full for the apprehension and surrender of persons over requests from another State. The view was also expressed, however, that the primacy of the jurisdiction of the court should prevail in all cases of most serious crimes, as defined in article 20, subparagraphs (a) to (d).

202. It was noted, however, that the grounds for refusing compliance with such requests from the court should be limited to a minimum, taking into account the special character of the jurisdiction of the court and the seriousness of the crimes to be covered under the statute, and that the results should be explicitly laid down in the statute itself. Many traditional exceptions to extradition were considered inappropriate in the light of the type of crimes to be dealt with by the court.

203. The issue of competing treaty obligations was recognized as a particularly difficult one. It was pointed out that the issue would not only relate to States' obligations under existing extradition treaties but also to the obligations under the status-of-forces agreements. The point was also made that different regimes of cooperation would have to apply to situations where both or only one of the States parties to the statute were parties to the treaty in question. It was further suggested that the issue would have to be dealt with in the context of the question of applicable law and the respective roles of the court and the custodial State. In this connection, note was taken of the fact that article 21, paragraph 2, of the draft statute adopted one approach to addressing this issue.

204. The importance of the role of national laws and courts in guaranteeing the fundamental rights of individuals was emphasized. It was pointed out that, in many States, such safeguards were part of constitutional requirements. It was also noted that, in some cases, national safeguards for the protection of the rights of accused persons might be greater than those existing in international law and the appropriateness of the direct application of standards established by the court, as envisaged in article 29, paragraphs 2 and 3, of the draft statute with regard to release, bail and a determination of the lawfulness of arrest, was questioned. It was emphasized, however, that care should be taken that adherence to national safeguards did not become an unjustifiable impediment to cooperation with the court.

2. Apprehension and surrender

205. The view was expressed that the system of apprehension and surrender under article 53 of the draft statute was a departure from the traditional regime of cooperation between States established under the existing extradition treaties. It was noted, in particular, that the article embodied a strict transfer scheme which did not seem to contemplate any significant role of the national courts and other authorities on this matter, and that it established a presumption of preference of the requests for transfer of accused persons to the court over requests by States. It was suggested that, while a case could be made for creating a new scheme of cooperation tailored to the special needs of the court, national constitutional requirements, particularly those for guaranteeing the protection of the fundamental rights of individuals, as well as the principles and established practices of the existing extradition treaties, should be fully taken into account if a truly effective system of cooperation was to be developed.

206. But there was also the view that, as long as the competence of the court was restricted to all or some of the most serious crimes as defined in article 20, subparagraphs (a) to (d), the primacy of the jurisdiction of the court in all cases of requests for transfer should indeed prevail. Otherwise, it was further noted, a homogeneous system of cooperation between the court and national authorities could not be guaranteed in relation to the application of national law and procedures and the provisions of the statute. According to this view, for those crimes referred to above, the jurisdiction of the court would be in respect of all persons arrested in a State that had accepted the jurisdiction of the court.

207. The point was made that these two different approaches to the question of surrender of the accused to the court militated in favour of the creation of two different schemes of cooperation within the statute: one being a transfer scheme similar to that proposed in the draft statute for those States that were able and willing to provide expedited transfers, and another based on the traditional notion of extradition for those States that were not able constitutionally to provide expedited transfers of the accused.

208. It was further remarked that the choice of concepts such as extradition, surrender and transfer was a matter that could have very different and far-reaching consequences in various States. It was therefore considered important that, whatever concept might be chosen or the number of schemes adopted, a list should be established, preferably in article 53, specifically indicating certain traditional limitations or exceptions that could not be invoked in connection with the court's requests for transfer of the accused.

209. With regard to the issues relating to apprehension, it was emphasized that domestic constitutional requirements should be taken into account when considering the roles of the court and national authorities in the arrest of an accused person. As to the question of the arrest warrant issued by the court, it was noted that the use of the term "provisional arrest" in two very distinct contexts - the pre-indictment arrest warrant, which was provisional for the court's own purposes, and the provisional arrest request, pending a formal request for surrender of the accused to the court - was confusing and needed to be clarified. With respect to provisional measures under article 52, it was suggested that inclusion of the notion of "emergency" might be appropriate.

210. As to the form and content of the court's requests for the arrest of the accused, some greater specificity about the content of those requests was suggested. The point was made that this issue could be particularly important for the court and for the requested States, where there might be the need for a review of the matters pertaining to the underlying case, as a matter of judicial confirmation of a request for surrender by national authorities.

211. The unusually long period of the pre-indictment detention provided for in article 28, paragraph 2, was noted with special concern as not being consistent with the national laws of many States. In this connection, the question was raised as to whether there was really a need in most instances for the Presidency to determine those issues as a matter of protecting the rights of the accused when, for most States, those same rights must be respected in national courts as well. Attention was drawn to the fact that the national court in which the accused was actually present with counsel and with the familiarity of the laws might afford a greater degree of protection and understanding of the rights of the accused.

212. With respect to the issues relating to surrender, it was noted that the question of the applicability of national judicial procedures to the surrender decision raised the difficult issue of the national inquiry into substantive matters pertaining to the accusation by the court. In this regard, the view was expressed that national authorities should not have the right to examine the warrant in relation to substantive law, while certain formal requirements might be made. The issue of different national requirements regarding sufficiency of evidence was also noted as a particularly difficult problem. It was suggested that this should be an issue only where it was an absolute requirement and care should be taken not to burden those national proceedings with issues that were not truly necessary under national law. As to the question of the relevance of dual criminality and statutes of limitations, doubts were expressed as to the appropriateness of such rules in relation to cases of surrender of the accused to the court, in view of the most serious character of the crimes under its jurisdiction.

213. The suggestion was also made that the system of apprehension and surrender under the statute should be extended to cover convicted persons, since there was the possibility that the arrest and surrender of a convicted person who had escaped custody might be sought.

214. As regards exceptions to the obligation to surrender, the view was reiterated that they should be kept to the absolute minimum and that they should be specifically articulated in the statute. In this connection, the appropriateness of such traditional limitations or exceptions as the nationality of the accused, the level of social integration and excuses and justifications under national law, or the political exception, was questioned. It was also

suggested that the lapse of time as well as the age and health of the suspected person should not be grounds for refusing surrender.

215. On the question of the applicability of some of the traditional delays, it was noted that domestic proceedings could involve a more serious offence than those before the court and therefore the notion of deferral of surrender or a scheme of temporary surrender should be considered, ensuring that both the domestic and the court prosecution could proceed on the basis of a temporary surrender of the accused to the court. It was also suggested that the State concerned could enforce both the domestic and the court sentences. Pendency of national proceedings relating to the same crime was also considered relevant, being consistent with the principle of complementarity.

216. With regard to the issue of the transfer of the accused to the court or to the detaining State, the view was expressed that such a transfer could be an appropriate cut-off point for shifting the primary responsibility over the accused from the national authorities to the international criminal court. It was suggested that the same consideration could equally apply to the pre-trial detention of the accused. It was further noted that this might be an appropriate solution for those States in which the initial proceedings regarding surrender would require some degree of national court involvement.

217. With regard to the issue of transit through third States in the course of transfer of the accused to the court or to the detaining State, there was recognition of the need to include in the statute a special provision concerning the duties of those transit States and the differences that should be made in this regard depending on whether the State concerned was a party to the statute or not. The possibility of ad hoc arrangements between the court and States not parties to the statute was mentioned.

218. Concerning other surrender issues, the importance of the question of competing treaty obligations was again emphasized. It was suggested that the requested State make its decision taking into account the overall purposes of the court, the principle of complementarity and the objective of producing the most appropriate jurisdiction for trying the accused. The suggestion was also made that the statute stipulate that, in cases of conflicting transfer/ extradition obligations, a State party to the statute should recognize the obligation to transfer an accused person to the court unless another State that had an extradition relation with the requested State could make, immediately, a prima facie case that it had sufficient jurisdiction and that the circumstances supported the claim that national prosecution would be effective. However, the view was expressed with respect to the provision of article 53, paragraph 4, that the presumption of the primacy of jurisdiction should be in favour of States rather than the court.

219. On the rule of specialty, the view was expressed that, while some provision concerning specialty was required in order to safeguard the rights of the accused, the statute should also provide for waiver by the requested State, the custodial State, as well as by the accused, in a manner similar to that envisaged under traditional forms of extradition treaty arrangements. It was further suggested that the rule of specialty might need to be expanded to encompass the question of the ability of the court to surrender to a third State according to its own proceedings as well as possibly, the need to distinguish between crimes committed after surrender, to which the rule of specialty generally did not apply. The view was also expressed, however, that the rule of specialty should not be applied with respect to the court.

220. The entire issue of re-extradition, namely, the transfer of the accused by the court to a third State, was considered important and worthy to be addressed specifically in the statute. In particular, the point was made that the question of whether there was a continuing right on the part of the custodial State to refuse to allow the court to hand over an accused needed to be explored.

221. The suggestion was also made that the question of international liability of national authorities when undertaking actions at the request of the court and the issue of the legal status of the court when involved in national proceedings should be examined.

3. Judicial assistance

222. The remark was made that, in common-law systems, "judicial assistance" did not encompass certain types of assistance, such as those requiring the use of the police force. It was accordingly suggested to use the term "mutual assistance", as did the United Nations Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117). While concern was expressed that the term "mutual" might imply reciprocity, which was not appropriate in the present context, the remark was made that mutual assistance implied equal access to evidence and information and not necessarily reciprocity.

223. Emphasis was placed by several delegations on the need for full cooperation between the international criminal court and national authorities, each taking account of the other's concerns and needs.

224. As regards judicial assistance during the investigation phase (prior to indictment), support was expressed for the establishment of a list itemizing the forms of assistance that States parties to the statute would be expected to provide to the international criminal court; that list would not necessarily be exhaustive but should identify the types of assistance that were compulsory.

225. As to whether the prosecutor should be entitled to carry out activities related to the preparation and prosecution of a case in the territory of a State, many delegations took the view that the consent of the State was a prerequisite and that the activities in question should be conducted in conformity with domestic constitutional and other requirements. For others, a differentiation should be made between the types of activities involved. The prosecutor might, for instance, be permitted, under the statute, to interview witnesses in the territory of a State party in accordance with domestic law, subject to, for comity reasons, informing the national judicial or police authorities concerned. Activities requiring coercive measures such as search and seizure or surrender should, however, be the exclusive prerogative of national police authorities, particularly as liability issues might arise. Multilateral treaties on mutual assistance and the United Nations Model Treaty on Mutual Assistance in Criminal Matters were mentioned as possible bases for the drafting of the relevant provisions of the statute.

226. It was pointed out that the limits to the prosecutor's authority to conduct activities relating to the preparation of a case in the territory of a State largely depended on whether or not that State had a functioning judicial system.

227. The remark was made that the statute should provide for exceptions to the obligation of a State to comply with a request for assistance from the

prosecutor. In this context, reference was made to constitutional barriers to compellability of witnesses, as well as to privileges exempting individuals from the obligation to testify.

228. Attention was drawn to the need to make it clear whether the obligation concerning the rights of the accused prior to questioning, which was provided for under article 26, paragraph 6, applied only to the prosecutor or also to national authorities when questioning a suspect for purposes of prosecution by the international criminal court.

229. The view was expressed that the statute should address the question of the gathering and confidentiality of information and evidence. It was recalled in this context that, in criminal proceedings, an accused should have full access to, and the opportunity to examine, the evidence against him or her.

230. Considering that one of the goals of the planned court was to encourage national prosecution of alleged offenders, and bearing in mind that not all States were bound by mutual judicial assistance agreements, it was suggested to include in the statute appropriate provisions on which States could rely in requesting assistance from each other.

231. Attention was also drawn to the guidelines elaborated by the International Tribunal for the former Yugoslavia for national implementing legislation aimed at facilitating cooperation with States under article 21 of its statute. Those guidelines dealt with the following issues: duty to cooperate; national authority responsible for cooperation with the Tribunal; concurrent jurisdiction; arrest, detention and surrender of the accused; provisional arrest; witnesses and experts; data from police files; immunity and free transit; seizure; return of property and proceeds of crime; and enforcement of sentences. Similar guidelines could be elaborated for the international criminal court on the major aspects of cooperation with States, other aspects being left to ad hoc arrangements between the court and the States concerned.

232. The remark was further made that, while a State party to the statute having consented to the jurisdiction of the court for a particular crime would obviously be obliged to comply with a request for assistance connected with that crime, it was not clear whether, in the absence of such consent, the State party would be under an obligation to comply with a request for assistance connected with the crime concerned. It was also noted that the draft statute did not address the question of the obligation of States to provide assistance to the defence or the role, if any, of the court or the prosecutor in processing such requests.

233. The delegations that commented on the issue of witnesses noted that, in relation to an international criminal court, the problem arose whether attendance of witnesses could be compelled directly or through State authorities. It was noted that, in many countries, it was not constitutionally possible to force a citizen to leave the country to attend judicial proceedings in another country. One solution to the problem was to obtain the testimony by way of a request for assistance to the State of residence of the witness; the requested State would use the means of compulsion allowed under its internal law and provide the international criminal court with a transcript of the examination and cross-examination. It was suggested that the relevant rules should be drafted flexibly to allow a judge or prosecutor of the international criminal court to be present and to play an active role. One delegation took the view that, in highly exceptional cases, some measures of indirect compulsion in the form of a fine or imprisonment could be taken by the requested State to

compel attendance of a witness. Other solutions that were mentioned included testimony by way of a live video link hooked up with the court or, subject to the agreement of the State concerned, the hearing of evidence, by the court, on the territory of the said State.

234. Attention was drawn to the need to address, preferably, in the view of one delegation, in the rules of evidence to be drawn up by the chambers, the question of the privileges of witnesses to refuse to testify (solicitor-client privilege, marital privilege, etc.). Other issues that were mentioned in this context related to safe conduct and to costs and expenses, including advance payments.

235. The issues connected with cooperation relating to indictment, judicial assistance during the post-indictment phase, provisional measures, specialty and communications and documents, as itemized in the guidelines reproduced in annex II to the present report, were viewed by the delegations that commented on them as important and worthy of further consideration.

236. The remark was made that, in discussing the question of judicial assistance, due account should be taken of the fact that the investigation process and the gathering of evidence might well start before an alleged criminal was identified and that provision should be made for cooperation between the States parties to the statute and the international criminal court prior to the stage in question. It was furthermore pointed out that the discussion had so far proceeded on the assumption that national judicial systems were able to cooperate. The question arose as to how the international criminal court would discharge its duties if it could not rely on functioning national judicial systems.

4. Recognition of the judgements of the court, enforcement of sentences and mutual recognition of judgements

237. As regards articles 58 and 59 of the draft statute, there were different views as to whether the statute should provide for the direct recognition and enforcement of the orders, decisions and judgements of the court under the continued enforcement approach or envisage some type of further action by the national authorities under the conversion approach. A suggestion was made that the statute should accommodate both approaches rather than choose one. A view was expressed that the extent to which States generally should be bound by decisions of the court was related to the questions of jurisdiction, consent and complementarity.

238. Attention was drawn to the question of the rights of third parties, particularly in those cases involving confiscation of property, forfeiture of profits and restitution issues. The question was raised whether third parties should have their rights determined by the international criminal court or be able to turn to domestic courts if their concerns were not addressed by the court.

239. With reference to article 59 of the draft statute, support was expressed for reliance, for the enforcement of sentences, on the States that had expressed willingness to accept prisoners for incarceration either in general terms or on an ad hoc basis. There was however also a view that article 59 should be amended to provide for an obligation of all States parties to enforce sentences of the court, except the State of the nationality of the accused and the State where the crime was committed.

240. The question whether the consent of the accused regarding the place of incarceration should be required elicited a negative reply, although it was suggested that the views of the accused could be taken into account.

241. Regarding which law should govern the enforcement of sentences, the view was expressed that the terms and conditions of imprisonment should be in accordance with international standards. It was also said that, while custodial and administrative authority over the convicted person should be delegated to the State that accepted responsibility for enforcing the sentence, the international criminal court should play some role in the supervision of the prisoner, perhaps through an appropriate international organization. The issue was also raised whether provision should be made for some form of communication channel between the court and the prisoner.

242. The question of fines and other financial sanctions was viewed by several delegations as requiring further consideration. The view was expressed that in light of article 47 of the draft statute, which provided for the imposition of fines, it was necessary to include a provision addressing the enforcement of this kind of penalty. However, it was also suggested that the difficulty of establishing such an enforcement mechanism should be considered in determining the appropriateness of including the provision concerning fines.

243. As regards article 60, the remark was made that, while the court should have control over the pardon, parole, commutation of sentence or release of the convicted person, care should be taken to ensure a relatively uniform administration at the national level. It was suggested that national authorities be allowed to make recommendations to the court based, for example, on the behaviour of the prisoner, or that national authorities and the court make a joint decision.

F. Budget and administration

244. As regards budgetary aspects, three main trends emerged: according to one trend, the costs of the court should be financed from the regular budget of the United Nations; according to another trend, they should be borne by States parties to the statute; and under a third trend, it was premature to discuss budgetary matters in detail until the nature of the court and the degree of its general acceptability had been clarified.

245. The proponents of the first approach emphasized the need to ensure the universal character of the court by making it part of the United Nations system. They felt it was necessary, given the nature of the crimes over which the court would exercise jurisdiction, to make it possible for all States to initiate proceedings without financial burdens - an objective which could not be achieved if only the States parties to the statute were to contribute to the financing of the institution. It was also observed that on a practical level it had been difficult to finance other institutions in this area by any voluntary or opting-in method alone.

246. Those favouring the second approach pointed out that a wide interest in the court on the part of States would translate itself into wide participation in its statute and, therefore, in a large number of contributing parties. Mention was made of the possibility of resorting to a formula similar to that applicable in the framework of the Permanent Court of Arbitration.

247. It was suggested that consideration should be given to making a State which initiated a procedure before the court share in the costs involved, with due regard to the special position of developing countries. A view was also expressed that costs of judicial assistance at the request of the court could be considered costs of the court itself. In response to the argument that a State might be precluded from seeking justice for lack of means, the opinion was expressed that very few States were so lacking in resources that they could not make some contribution, bearing in mind, in particular, that in the absence of an international criminal court, they themselves would have to bear the relevant costs. The remark was also made that the United Nations should bear financial responsibility in relation to cases referred by the Security Council.

248. In order to reduce costs, however funded, it was suggested that, whenever possible, the court should move to the location where a particular crime had been committed. It was also suggested that a State which had lodged a frivolous complaint should be made to pay some of the costs. Mention was further made of the possibility of establishing an auditing mechanism to monitor the expenditures of the court, as well as a supervisory mechanism to oversee the administration of the court.

249. It was pointed out that the court would need to have a legal personality. It was also suggested that the statute should include provisions regarding the privileges and immunities of the court and its officials.

III. CONSIDERATION, IN THE LIGHT OF THE AD HOC COMMITTEE'S REVIEW OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE PREPARED BY THE INTERNATIONAL LAW COMMISSION, OF ARRANGEMENTS FOR THE CONVENING OF AN INTERNATIONAL CONFERENCE OF PLENIPOTENTIARIES

250. In the second phase of its work, the Ad Hoc Committee considered the above issue on the basis of proposals prepared by the Chairman (see paras. 255-259 below).

251. All the delegations that spoke placed emphasis on the quality of the work accomplished by the Ad Hoc Committee, which reflected a general awareness of the importance of the exercise and augured well for the future, as well as on the need to enlist the participation of all countries in what was termed an important and historic venture.

252. A large number of delegations observed that the Committee had fulfilled the mandate entrusted to it by the General Assembly and that the time had now come to enter into a new phase of negotiations to prepare the text of a convention to be adopted by a conference of plenipotentiaries. They therefore welcomed the proposal that the mandate for future work be changed to that effect. Appreciation was at the same time expressed to the International Law Commission for its valuable draft. While the delegations in question were prepared to accept the text proposed by the Chairman as a compromise text, they nevertheless regretted that that text did not provide for a precise timetable for the completion of what they considered as an urgent task. Most of them felt that it was not unrealistic, provided the necessary ingredients (political will, resources and broadly based expertise) were available, to envisage concrete scenarios involving the consideration of specific issues by working groups meeting simultaneously over a given period of time in the course of 1996, which would make it possible to complete the preparatory work in time for a conference to be convened in 1997. Some delegations expressed the view that such a conference could be envisaged in 1996. While regret was expressed that the proposals of the Chairman did not touch on the timing aspect, it was noted that all options, among which several delegations singled out the convening of a preparatory committee in 1996, remained open and that it would be for the Sixth Committee and the General Assembly to determine the future course of action.

253. Some delegations agreed that the Ad Hoc Committee had achieved useful results and welcomed the constructive approach taken thus far; they stressed that much more work was needed. They pointed out that the ultimate goal was not an international conference but the establishment of an effective international criminal court endowed with moral authority and independence and enjoying universal support and participation. Emphasis was placed in this connection on the complexity of the current exercise, which had to solve many difficult and novel problems and to take account of the diversity of constitutional and legal systems if it was to result in a truly international court. The delegations in question stressed that a fruitful continuation of the work required in-depth exploration of a number of issues as well as the active involvement of the widest possible number of countries. Some delegations expressed concern that these tasks could not be accomplished over a period of one year. While some among them took the view that some issues were ripe for drafting, others were not and felt that it was inadvisable, at the current stage, to change the character of the work as conducted so far. Some were of the view that there was still a long way to go before negotiations could meaningfully be initiated. The

delegations in question warned that if the goal was to establish an international criminal court rather than sending political signals of progress, it was unwise to set unrealistic timetables and refer to the convening of a conference, thereby pre-empting the authority of the General Assembly and prematurely interfering with the normal course of things. The view was expressed by a delegation that the third sentence of the third paragraph of the Chairman's proposal could read: "In the light of the progress made, the Committee is of the opinion that issues can be addressed most effectively by further discussions with a view to the drafting of the text of a convention by a conference of plenipotentiaries to be convened."

254. Appreciation was expressed by a number of delegations for the renewed generous offer of the Italian Government to host a conference on the establishment of an international criminal court.

IV. CONCLUSIONS OF THE AD HOC COMMITTEE

255. By its resolution 49/53 of 9 December 1994, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court and directed it "to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries", and decided "to include in the provisional agenda of its fiftieth session an item entitled 'Establishment of an international criminal court', in order to study the report of the Ad Hoc Committee and the written comments submitted by States and to decide on the convening of an international conference of plenipotentiaries to conclude a convention on the establishment of an international criminal court, including on the timing and duration of the conference."

256. The Ad Hoc Committee for the Establishment of an International Criminal Court wishes to emphasize the usefulness of its discussions, during which it conducted a review of the major substantive and administrative issues arising out of the draft statute for the establishment of an international criminal court. The Committee has made considerable progress during both its sessions on key issues such as complementarity, jurisdiction and judicial cooperation between States and the international criminal court.

257. Further work on the establishment of an international criminal court has to be done. Work should be based on the draft statute of the International Law Commission and should take into account the reports of the Ad Hoc Committee and the comments submitted by States and, as appropriate, contributions of relevant organizations. In the light of the progress made, the Committee is of the opinion that issues can be addressed most effectively by combining further discussions with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries. The Committee proposes therefore that the mandate for future work be changed to that effect.

258. Aware of the interest of the international community in the establishment of an international criminal court which would be widely accepted, the Committee recommends that the General Assembly take up the organization of future work with a view to its early completion. 11/

259. In order to promote universality, which is an important element for a successful international criminal court, the Committee encourages participation by the largest number of States in future work.

Notes

1/ For the membership of the Ad Hoc Committee at its first session, see A/AC.244/INF/1 and Add.1 and A/AC.244/INF/2 and Add.1.

2/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II.B.I; and A/49/355, chap. II.

3/ Comments were received from: Azerbaijan, Barbados, Belarus, China, Cyprus, Czech Republic, France, Libyan Arab Jamahiriya, Singapore, Sudan, Sweden, Switzerland, Trinidad and Tobago, United States of America and

Venezuela, as well as from the Crime Prevention and Criminal Justice Branch and the United Nations International Drug Control Programme and from the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

4/ It was pointed out that complementarity might be regarded not as a principle but rather as an objective to be achieved.

5/ United Nations, Treaty Series, vol. 78, No. 1021, p. 277.

6/ Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

7/ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro); see Official Records of the General Assembly, Fiftieth Session, Supplement No. 4 (A/50/4), paras. 98-119.

8/ One representative felt that paragraph 1 (b) (i) of article 21 did not fit well with paragraph 1 of article 53 and that in any event the requirement established in the said subparagraph (b) (i) should be removed. To make his thinking more readily understandable, he stated that his concerns would be met if the text of subparagraph (b) was replaced with the following:

"(b) in any other case where:

(i) a complaint is brought under article 25 (a);

(ii) the jurisdiction of the Court is accepted under article 22 by the State on the territory of which the act or omission in question occurred; and

(iii) the suspect has been surrendered to the Court, voluntarily or not, by a State to which the Registrar of the Court has submitted a warrant for arrest in accordance with article 53 (1)."

9/ See paras. 63-71 above for the different views expressed on the question of whether the crime of aggression should be included in the jurisdiction of the court.

10/ It was noted in this connection that the draft contained no provision on the competence of the accused to stand trial.

11/ Some delegations saw merit in setting a date for the completion of the work. 1996 was mentioned. Others considered that it was not yet possible to fix a realistic date at this stage.

ANNEX I

Guidelines for the consideration of the question of the relationship between States parties, non-States parties and the International Criminal Court

I. GENERAL ISSUES RELATING TO STATES' COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

1. The question of cooperation is intrinsically linked with the overall problem of the applicability of national law to the national part of the cooperation: in this context the question arises as to whether the State, when acting within the framework of cooperation, acts within the ambit of the court's authority as its organ or whether the cooperation is performed by the State on its own authority and subject to national law.

2. Choice of mutually non-exclusive approaches for dealing with assistance (both surrender and judicial assistance) in the Statute:

(a) A general facilitating provision, relying on existing judicial assistance and extradition regimes; for example, for judicial assistance, a general provision supplemented by a non-exclusive list of the type of assistance that could be sought;

(b) A detailed regime in, or annexed to, the statute; for example, for surrender of accused persons, a new mechanism of "transfer" as proposed by the ILC.

3. Extent of obligations of States Parties to assist:

(a) Absolute, or subject to exceptions; if exceptions, what should be the exceptions and what are the justifications for those exceptions?

(b) Factors which may influence the extent of obligations: State's consent to jurisdiction of the international criminal court for the type of crime, or for the specific crime at issue;

(c) Principle of complementarity;

(d) Traditional considerations of essential interests (ordre public);

(e) Compliance with other conventions.

4. Role of national laws/courts in guaranteeing fundamental rights: can or should national authorities defer to the international criminal court on these matters?

II. CLUSTERS OF ISSUES RELATING TO SPECIFIC ASPECTS OF COOPERATION

First cluster: apprehension and surrender

1. Triggering act by the international criminal court: arrest warrant issued by the court.

Confusion created by concept of "provisional arrest" in article 28 (as compared to article 52).

The difference between pre-indictment arrest and post-indictment arrest.

Are a court arrest warrant and some form of accusation prerequisites to the apprehension of the accused by a State?

2. Request by the international criminal court for arrest of accused - form and content of the request and its communication to national authorities:

(a) For provisional arrest (art. 52); for formal request for arrest and surrender (art. 57);

(b) Extent to which detailed guidance is needed in the statute (or in an annex thereto).

3. Arrest of accused by national authorities for purposes of surrender to the international criminal court (based either on a request for provisional arrest (art. 52) or a formal request for arrest and surrender (art. 57)).

Roles of national authorities and of the international criminal court at the phase of initial arrest:

(a) Executing warrant of the court versus executing request to arrest, pursuant to national authority and laws?

(b) Applicability of national judicial proceedings [constitutional requirements/fundamental rights];

(c) Protection of the rights of the accused in connection with arrest - application of the standards of the court versus national standards;

(d) Arrest of persons other than the accused.

4. Pre-surrender detention:

(a) Determined by the court (application of art. 29 to be considered) or determined by national authorities?

(b) Governed by national law, relevant international standards, or standard provided in the statute of the international criminal court?

5. The surrender decision:

(a) Role, if any of national courts or other authorities;

(b) Applicability of national judicial proceedings; in the affirmative, what legal issues may be addressed (e.g., identity of accused, whether valid court accusation and arrest warrant; crime charged is a crime within the jurisdiction of the court, legal rights of the accused concerning the request for surrender):

- Different national requirements regarding sufficiency of evidence;

- Relevance of dual criminality and statutes of limitation.

(c) Application of national law, particularly issues/rights of fundamental or constitutional dimension.

6. Absolute obligation to surrender versus general obligation subject to exceptions. If exceptions, to what extent are traditional limitations on extradition appropriate in the context of the international criminal court? Some examples of traditional limitations or exceptions include:

- Non bis in idem;

- Political offence;

- Nationality of the accused;

Some examples of traditional delays include:

- Pendency of national proceedings relating to same crime;

- Deferral of surrender versus temporary surrender where accused subject to proceedings for other offence.

7. Transfer of accused to the court or to a "detaining" State acting as custodian for court pre-trial detainees:

(a) Does transfer of the accused (or the decision to surrender) occasion a shift in primary responsibility for the accused from the national authorities to the international criminal court?

(b) Which authorities are responsible for transfer?

8. Problems of transit through third States in the course of transfer of accused to the international criminal court or to a "detaining" State:

- Scope of the duties of the transit State.

9. Pre-trial detention of the accused:

(a) (The text of the draft statute does not clearly distinguish between (a) detention by national authorities pending national decision to surrender and (b) detention (pre- or post-trial) by national authorities agreeing to act as custodial agent for the court - referred to here as a "detaining" State);

(b) Determined by the court (art. 29) or by "detaining" State authorities?

(c) Whether the statute of the court, other relevant international standards or national law should control;

(d) Accused's challenges to the lawfulness of detention:

- Decided by the court (art. 29(3)) or by national authorities?

- Does recourse to the court under article 29(3) exclude accused's fundamental rights under national law to challenge in national courts the lawfulness of detention? If not, what is locus standi of the international criminal court in proceedings before a national court?

10. Other surrender issues:

(a) Obligations to the international criminal court versus obligations/rights under existing extradition treaties, other bilateral or multilateral arrangements, or status-of-forces agreements:

- Should the international criminal court's request be given priority (art. 53(4))?

- Should the answer to this question depend on whether a State party to the statute has consented to the jurisdiction of the court over the crime at issue?

(b) Rule of speciality (art. 55).

Second cluster: judicial assistance

1. Judicial assistance during investigation phase (prior to the indictment)

- Different kinds of judicial assistance (should an enumerative list be included; should a distinction be drawn between compulsory and non-compulsory measures?);

- Should the prosecutor be entitled to carry out activities on the territory of a State other than the host State

  - On its own (such as to collect documentary and other evidence, to conduct on-site investigations);

  - On its own but subject to the consent to the State concerned;

  or should the State concerned carry out those activities (in conformity with traditional practice in matters of international judicial assistance)?

- Possibility of different approaches under different circumstances;

- Examination of lawfulness of on-site activities undertaken by the prosecutor or carried out on behalf of the prosecutor by a State; sanction and compensation for unlawful acts;

- Need to clarify the relation between articles 26 and 51;

- Requirement and conditions of consent of the State concerned;

- Extent of the legal obligation to comply with a request by the international criminal court to carry out such activities:

  - Exceptions and limitations to such obligation;

  - Which States are obliged? Is the criterion consent to the jurisdiction of the court over the crime, participation in the statute or any other factor?

- Applicability of constitutional requirements or of standards of fundamental human rights to the activities of the prosecutor;

- Applicability of national law and procedures;

- Possibility of ad hoc arrangements of the prosecutor with a State concerning modalities for transfer of information.

2. Cooperation relating to indictment (arts. 30 and 38)

- Notification of the indictment to the suspect through national authorities;

- Forms of assistance of States to the court to bring the indictment to the attention of the accused.

3. Judicial assistance during post-indictment phase and during trial (art. 38) (many of the issues described under point 1 arise in this context as well)

- Legal effect of a request by the court under paragraph 5 (b) and (c); legal obligation incumbent on (which) State?

- Legal consequences of a refusal to comply with such a request for the refusing State (impact on process?);

- Request for coope ation made on behalf of the accused;

- Capacity to compel attendance of witnesses (are there other alternatives?).

4. Provisional measures (art. 52)

- Form and content of a request for provisional measures;

- Legal consequences of the provisional seizure of documents and other evidence (compensation for costs incurred);

- Which procedures are applicable to a State's measures to prevent injury to or intimidation of a witness or the destruction of evidence?

- Legal implications of the absence of a subsequent formal request.

5. Speciality (art. 55)

- Power of the international criminal court to deviate from the rule of speciality in respect of evidentiary documents and materials - condition of the consent of State?

- Power of the court to request waiver of the condition of speciality - duty to comply?

6. Communications and documents (art. 57)

- Form and content of communications and documents required in the context of cooperation;

- Modern methods of communication and conditions of their use.

7. Obligations

- Obligations to the court versus obligations/rights under existing extradition treaties and arrangements on judicial assistance.

Third cluster: recognition of judgements of the international criminal court

- Different types of judgements of the court and their impact on their recognition and implementation;

- Character of a judgement of the court - qualified as a national judgement?

- Is it subject to examination through national procedures? If so, to what extent?

- Applicability of national law on recognition procedures (continued enforcement or conversion);

- Protection of the rights of third parties.

Fourth cluster: enforcement of sentences

- Requirement of consent of State (case-by-case or general acceptance?) (see subtopics (a) and (b) below);

- Necessary documentation (see subtopics (a) and (b) below):

(a) Enforcement of sentences involving imprisonment:

- Imprisonment according to national law or international standards;

- Applicability of national procedure (to, for example, temporary absences);

- Status of the international criminal court in the supervision of the imprisonment;

- State's duties concerning communications between the prisoner and the international criminal court;

- National court versus international criminal court responsibility for decisions on pardon, parole and commutation of sentences;

(b) Enforcement of sentences involving penalties other than imprisonment:

- Procedure for the enforcement of judgements (national versus internationally regulated);

- Protection of the rights of third parties;

- Asset sharing.

Fifth cluster: mutual recognition of judgements

- Non bis in idem:
  - As a bar to judicial assistance;
  - As a bar to trial proceedings;
- Recognition by the international criminal court of other national judgements.

ANNEX II

Guidelines for consideration of the question of general principles of criminal law

The following items could be discussed under this topic

A. Process issues

1. Method of elaboration:

- By States in the statute (or in an annex thereto);
- By the international criminal court on a case-by-case basis;
- By the international criminal court as part of the rules (to be confirmed by State parties?);
- Combination (e.g., major issues determined in the statute or in an annex thereto and others left for the court to determine).

2. Relevance of internal law:

- Application of the law of a particular State;
- Which State?
- Reference to national law as interpretative aid;
- Particular State (which State?);
- Common principles represented within the world's legal systems.

B. Substantive issues

1. General principles:

- Non-retroactivity;
- Punishment by customary international criminal law;
- Individual responsibility;
- Irrelevance of official position;
- Criminal liability of corporations?
- Appropriateness of statutes of limitations.

2. Actus reus:

- Act or omission;
- Causation and accountability.

3. Mens rea:

- Intention (culpa, dolus/intentionally, knowingly, recklessly/dolus eventualis, gross negligence);

- General intention - specific intention? (motives);

- Age of responsibility.

4. Other types of responsibility:

- Solicitation/incitement;

- Attempts;

- Conspiracy/complot;

- Aiding and abetting;

- Accessory;

- Complicity;

- Command responsibility/responsibility of superiors for acts of subordinate.

5. Defences:

(a) Negation of liability:

- Error of law?

- Error of fact?

- Diminished mental capacity:

  To stand trial

  Regarding liability;

(b) Excuses and justification:

- Self-defence;

- Defence of others;

- Defence of property?

- Necessity;

- Lesser of evils;

- Duress/coercion/force majeure;

- Superior orders;

- Law enforcement/other authority to maintain order;

(c) (Defences under public international law/depending on jurisdiction):

- Military necessity

- Reprisals

- Article 51 of the Charter of the United Nations (cf. justifications in the International Law Commission draft on State responsibility)

6. Aggravating and mitigating circumstances:

- Effect on liability and/or penalty?

7. Penalties:

(a) Discharge of penalties;

(b) Types of penalties (imprisonment, fines, restitution/forfeiture/confiscation);

(c) Maximum and minimum amount of punishment.